In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-481

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL NO. 6, AFL-CIO,
Petitioners,

vs.

SAN FRANCISCO ELECTRICAL CONTRACTORS ASSOCIATION,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

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IBEW Local 6 petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App.[1] A, pp. A-1 to A-12) is reported at 577 F.2d 529. The findings and conclusion of the United States Court for the Northern District of California appears at App. D p. D-1 to D-6.

[1]"App." refers to the appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals (App. B) was entered on June 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The general question presented is whether the United States District Court possessed jurisdiction under §301 of the Taft-Hartley Act, 29 U.S.C. §185, to issue a Temporary Restraining Order and a Preliminary Injunction against a concerted work stoppage by the Union (IBEW Local 6)[2] to protest the refusal of the San Francisco Electrical Contractors Association (SFECA) to process a grievance through the parties' contractual grievance/arbitration procedures.

Subsidiary to the General Question presented are the following:

1. Whether, under *Operating Engineers v. Flair Builders*, 406 U.S. 487 (1972), the Federal District Court or the arbitrator has primary jurisdiction to determine the merits of a *res judicata* defense to a subsequently filed grievance, where the parties have promised that "all problems and disputes" relating to their collective bargaining agreement are subject to exclusive determination through contractual grievance/arbitration procedures.

2. Whether, under *Buffalo Forge v. United Steelworkers*, 428 U.S. 397 (1976), the U. S. District Court or an arbitrator has primary jurisdiction to determine the lawfulness of a work stoppage where the parties' grievance/

[2]International Brotherhood of Electrical Workers Local No. 6, AFL-CIO.

arbitration clause requires both parties to submit and resolve all "disputes and problems" relating to their agreement through contractual grievance/arbitration procedures.

3. Whether the United States District Court has jurisdiction to issue a *post*-arbitration injunction under the *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970) exception to the prohibition against Federal Labor injunctions contained in the Norris-La Guardia Act, 29 U.S.C. § 101, *et seq.*

STATUTES INVOLVED

The relevant provisions of the statutes at issue are contained in appendix J and are as follows:

Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (App. J); Sections 4, 7, 8 and 9, of the Norris-La Guardia Act, 29 U.S.C. § 104, 107, 108 and 109 (App. J).

CONTRACTUAL PROVISIONS INVOLVED

The relevant grievance/arbitration provisions of Local 6/SFECA Agreement involved are as follows:

> Sec. 4. During the term of this Agreement there shall be no stoppage of work either by strike or lockout because of any proposed changes in this Agreement or dispute over matters relating to this Agreement. All such matters must be handled as stated herein.
>
> * * *
>
> Sec. 6. Problems or disputes between the UNION and the EMPLOYER [SFECA]/Employer [the Company] shall be referred to the UNION representative and the contractor's representative. If they are unable

to resolve the matter, it shall be referred to the Labor-Management Committee.

* * *

Sec. 8. Should this Committee fail to agree or to adjust any matter, such shall be referred to an arbitrator . . . His decisions shall be final and binding. This Arbitrator so selected shall not have authority to consider any matters other than those specifically presented to him by the Labor-Management Committee.

Sec. 9. When any matter in dispute has been referred to conciliation or arbitration for adjustment, the provisions and conditions prevailing prior to the time such matter arose shall not be changed or abrogated until agreement has been reached or a ruling has been made.

The grievance procedure must be used by both the Contractors and the Union.

STATEMENT OF THE CASE

A. FACTS[3]

The San Francisco Electrical Contractors Association (SFECA) is an organization of employers engaged in the

[3]The only factual issues in dispute are:

(a) Whether the May 26 award has a *res judicata* effect on the May 19 grievance, explained *infra.*

(b) Whether Underwriters Laboratory approval would be jeopardized by jobsite attachment of the Electro/Connect plugs to the standard Westinghouse fixtures rather than factory installation of the plugs.

(c) Whether the Company exercised "right of control" with respect to the assignment of the work involved in the attachment of the Electro/Connect plugs to the Westinghouse fixtures.

(d) Whether the work stoppage commencing June 27, 1977 was in violation of an arbitration award issued May 3 as explained by the arbitrator's decision issued May 26.

The above issues were determined adversely to the Union by the United States District Court, and affirmed as "not clearly erroneous" by the Court of Appeals (App. A at p. A-12)

electrical construction industry which represents its members in collective bargaining and labor relations. Collins Electric Company ("The Company") is a member of SFECA. The Company employs members of the IBEW Local 6 pursuant to the IBEW 6/SFECA Directory of Agreements, a collective bargaining agreement. The collective bargaining agreement contains the grievance/arbitration provisions set forth above.

1. *The First Grievance*

In 1976, the Bank of America National Trust and Savings Association was engaged in the construction of a computer data center in San Francisco. On April 7, 1976, Collins Electric Company entered into a contract with the general contractor to install a lighting system consisting of 11,000 lighting fixtures and associated branch wiring. The system originally called for was a standard system requiring the fabrication at the job site of a conduit and junction box power distribution assembly through which wires are pulled and attached to the internal wiring within the lighting fixture. In late November or early December, 1976, Bank of America secured a variance to the San Francisco Electrical Code to use a new lighting system called Electro/Connect. The Electro/Connect system is a prefabricated lighting system which does not require the jobsite construction of a conduit-junction box power distribution system.

When the Union learned early in 1977 of the Electro/Connect system's contemplated use by Collins in the Bank of America project, it grieved. The grievance alleged that Collins' use of the system violated the work preservation clauses of the IBEW Local 6/SFECA collective bargain-

ing agreement and § 8(a)(5) of the NLRA, as amended, 29 U.S.C. § 158(a)(5). An expedited arbitration was arranged to determine the dispute prior to actual physical delivery of the system to the jobsite. The hearing was held on March 17.

2. *The Arbitrator's Award*

On May 3, 1977, the arbitrator filed his expedited award, without opinion, stating that:

> "The grievance is denied. Thus, the employer may use the Electro/Connect System in the Bank of America fixture installation job at Market and Van Ness without violation of the collective bargaining agreement or the National Labor Relations Act."

On May 26, the Arbitrator filed his opinion on the original grievance. (App. F) It stated in part:

> "In the present dispute, the use of an Electro/Connect system has been prescribed by the Bank of America, the owner of the project. Collins Electric is powerless to provide the work which the Union demands unless the Bank of America is prepared to forego the use of the Electro/Connect system. Thus, in the present case, as in *Enterprise Association* [429 U.S. 507, 97 S.Ct. 891, 51 L.Ed.2d 1 (1977)] and in three of the four *National Woodwork cases,* [386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed2d 357 (1967)] the Union cannot lawfully insist upon compliance by Collins with the work preservation in the collective bargaining agreement. Collins has no control over the type of installation to be made on the project, and therefore, the pressure exerted by the Union cannot properly be said to be pressure addressed to the labor relations of Collins vis-a-vis the members of Local 6 employed by it."

The Arbitrator stated in response to the Union's argument based upon *Steamfitters Local 342 (Overaa Construction Co.)*, 225 NLRB No. 195, that where an employer has the right to control and thereafter gives it up, he is not protected by the Board's right of control doctrine:

> "The action of Collins in the present case is distinguishable from that of Overaa in the cited case in that it does not appear from the record that Collins exercised any control in the making of the decision which resulted in shifting from a conventional installation to the Electro/Connect installation. Thus, it cannot be argued that Collins exercised control to relinquish control. It had no voice in the change and had no unused power to veto the change; at present, it has no power to award branch wiring work to its employees. Since Collins, unlike Overaa, did not create and is not responsible for its lack of power to award the work, the *Overaa* decision is inapposite."

And finally, the Arbitrator stated that as there was no exercise of control by Collins, he would not reach the contractual issue posed by the work preservation clause of the parties' agreement.

> "Since it has been concluded, in the context of the fact situation involved herein, that the provisions of the 'Scope of Agreement' language in the Contract cannot be given effect, the question of whether installation of the Electro/Connect system would violate the 'Scope of Agreement' clause (if that clause were enforceable in the present context) has not been dealt with. Any conclusion with respect to that question would be *dicta.*"

Pursuant to this award, the Union had since May 3, 1977 proceeded with the installation of the Electro/Connect system.

3. *The Second Grievance*

After the March 17, 1977 hearing, but prior to the receipt of the Arbitrator's award, the Union learned that Electro/Connect fixtures were not going to be used at the Bank of America job, but rather that the standard Westinghouse fixtures already procured by Collins were to be returned to the Westinghouse factory in Mississippi along with the plugs from the Electro/Connect system to be installed in the fixtures by employees of Westinghouse.

The Union wrote to SFECA and Collins in an attempt to determine whether the assignment of the plug installation work was within the control of Collins Electric rather than Bank of America. (App. I) The Company refused to reveal any information about the Westinghouse transaction.[4]

Thus, on May 19, 1977, the Union filed a grievance alleging that the installation of the Electro/Connect plugs in the Westinghouse fixtures by Westinghouse employees was work covered by the IBEW/SFECA agreement and requested damages for breach of the agreement.

The Union's grievance was predicated on its belief that Collins possessed right of control over the assignment of the installation of the Electro/Connect plugs in the fixtures, and that its control had been exercised by subcontracting that work to Westinghouse. The Union viewed the arbitrator's award conclusive only as to the issue of whether

[4]The Union filed an unfair labor practice charge alleging that the failure of SFECA and Collins to divulge this information violated § 8(a)(5) of the NLRA as amended 29 U.S.C. 158(a)(5). The Board's Regional office refused to issue a complaint on grounds that the Union waived its right to the information by not requesting a re-opening of the arbitration hearing.

the Electro/Connect system might be substituted for a conventional lighting system. It did not view the award as forbidding them from raising questions with respect to who would install it. The Employer, on the other hand, apparently concluded that the award covered not only whether the system might be substituted for a conventional system, but any dispute in connection with the installation of the system, as well, even installation work which it, rather than Bank of America, controlled.

4. *The Work Stoppage*

SFECA refused to recognize the Union's grievance, contending that it had already been resolved by the arbitration award. Between June 17 and June 24, 1977, the Union attempted through the auspices of the International Union and the SFECA's national organization, to persuade SFECA to process its grievance through the parties' grievance procedures. Those efforts were not successful.

On June 24, the Union sent SFECA a letter of ultimatum. (App. G) It stated that "commencing at 8:00 a.m. on Monday June 27," IBEW Local 6 would order electricians off the Collins Electric job at the Bank of America "to protest the SFECA's refusal to participate in the Labor-Management Committee process" in connection with the Union's grievance. It stated it was the Union's ". . . wish to avoid any action which would violate the National Labor Relations Act under the Board's right to control doctrine and to determine under that doctrine whether the [Westinghouse fixture] modification constitutes a violation of our agreement". It promised that the electricians would return to work upon SFECA's "agreement to process our May 19,

1977 grievance through the contractual procedures." On June 27, the electricians stopped work.

On June 30, 1977, the Union and SFECA stipulated to a confirmation of the arbitration award in the Superior Court of California. On the same day SFECA commenced the action below seeking an injunction against the work stoppage.

B. THE TEMPORARY RESTRAINING ORDER

On June 30, upon application by SFECA, the United States District Court, based solely upon the verified complaint, one affidavit, and argument by counsel, issued, without findings, the following Order against IBEW Local 6, restraining it from:

> "1. directly or indirectly ordering, persuading, authorizing or otherwise inducing any IBEW Local 6 electrical workers to strike, picket or withhold their services or labor on the Collins Electric Company subcontract electrical work, of any nature, on the Bank of America data center jobsite, located at Mission, Market and 11th Streets, San Francisco, California, . . ."
>
> "2. directly or indirectly ordering, encouraging or authorizing any acts of work stoppage, work slowdown, vandalism, harassment, or interference with the above described. . . ."

C. THE PRELIMINARY INJUNCTION

A slightly modified preliminary injunction (App. C) issued on August 22, 1977 after three days of hearings before U. S. District Court Judge Cecil Poole. During the hearings the Union argued:

(a) That there could be no *Boys Market* injunction because of the Employer's position that there was no arbitrable grievance, and because the Employer was refusing to go to arbitration.

(b) That an injunction was barred by this Court's holding in *Buffalo Forge, supra,* because whether the work stoppage violated the agreement was itself arbitrable under the agreement.

(c) That *res judicata* was a defense to the grievance, and that the determination of that defense was within the arbitrator's jurisdiction.

(d) That the Employer had adequate remedies elsewhere:

(1) To participate in an arbitration and prevail or;

(2) To cite the Union for contempt of the California Supreme Court confirmation Order. (See App. E, Defendants' Proposed Substitute Findings of Fact and Conclusions of Law.)

In addition, the Union offered to stipulate to the injunction in return for the Employer's promise to process the grievance. This offer was refused.

Judge Poole found that the issues raised by the Union's grievance were factually the same as those arbitrated on March 17 and thus, the grievance was barred by the Arbitrator's award pursuant to the doctrine of *res judicata.* Therefore, as SFECA was under no obligation to process the grievance, the court determined that the strike in furtherance of processing that grievance was unlawful and subject to injunction under Section 301 of the Taft-Hartley Act. (App. D, Findings of Fact and Conclusions of Law.)

In coming to its conclusion, the District Court had to and did review not only the Arbitrator's award, but the presentations by both sides in the underlying arbitration proceeding. In addition, the court received conflicting testimony on (1) whether Collins Electric or Bank of America exercised right of control with respect to having the Electro/Connect plugs inserted by Westinghouse rather than at the jobsite by Collins' employees; (2) whether the U.L. approval of the Electro/Connect system would have been jeopardized by jobsite installation of the Electro/Connect plugs rather than by factory installation. The Court determined each factual issue against the Union.

D. THE COURT OF APPEALS DECISION

The Court of Appeals affirmed the issuance of the preliminary injunction citing the "sense of" Justice Douglas' dissent in *Longshoremen v. Marine Trade Association,* 389 U.S. 64 (1967) as the basis for its conclusion that the court possessed the jurisdiction to enjoin the strike over the failure to process the Union's grievance as an aid to enforcing the Arbitrator's award. The court then determined, without using the term *res judicata* and without discussing the implications of *Operating Engineers v. Flair Builders, supra,* 406 U.S. 487 (1972), that the District Court's determination of the disputed factual issues raised by the SFECA's *res judicata* defense to the grievance were not "clearly erroneous". Thus, in the opinion of the Court of Appeals, the issuance of the preliminary injunction was proper.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals is in direct conflict with or misconstrues three important lines of cases decided by this court. *First,* the Court of Appeals unnecessarily extended to post-arbitration situations the pre-arbitration injunction remedy sanctioned in *Boys Markets.*[5]

The Court of Appeals determined that the District Court's issuance of an injunction in this case was proper under its construction of *Boys Markets,* despite the clear holding of this Court that a status quo injunction is only appropriate when: (a) there is arbitrable dispute, and (b) the injunction is conditioned upon the petitioning party's willingness to arbitrate that dispute.

Second, the Court of Appeals sanctioned an injunction against a work stoppage, the lawfulness of which was itself a "problem or dispute" subject to determination through the parties' grievance and arbitration procedures, in direct contradiction to this Court's holding in *Buffalo Forge,*[6] to wit:

> "The contracts here at issue, however, also contained grievance and arbitration provisions for settling disputes over the interpretation and application of the provisions of the contracts, including the no-strike clause. That clause, like others, was subject to enforcement in accordance with the procedures set out in the contracts. Here the Union struck, and the parties were in dispute whether the sympathy strike violated the Union's no-strike undertaking. *Concededly, that issue was arbitrable.* It was for *the arbitrator to deter-*

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[5] *Boys Markets v. Retail Clerks Union* (1970) 398 U.S. 235 [90 S.Ct. 1583, 26 L.Ed2d 199]

[6] *Buffalo Forge Co. v. United Steelworkers of America* (1976) 428 U.S. 397 [96 S.Ct. 3141, 49 L.Ed2d 1022].

mine whether there was a breach, as well as the remedy for any breach, and the employer was entitled to an order requiring the Union to arbitrate if it refused to do so." 428 U.S. at 409, 410 (Emphasis added.)

Thirdly, the Court of Appeals sanctioned a remedy against the Union which precluded access to its contractual grievance procedure, access which is favored by this Court's decisions in the *Steelworkers Trilogy,*[7] on the grounds that the U.S. District Court's determination that the Employer's *res judicata* defense to the grievance was not "clearly erroneous". Jurisdiction to determine the merits of a *res judicata* defense to a grievance resides in the arbitrator, because *res judicata* is a defense to the merits of the grievance and does not go to the question of the arbitrator's jurisdiction. This Court's holdings in *John Wiley & Sons v. Livingston*[8] and *Operating Engineers v. Flair Builders*[9] clearly establish that determination of the *res judicata* effect of a prior award is a question for the arbitrator. In *Flair Builders,* this Court stated in explication of an arbitration clause similar in breadth to the one involved in this case:

> "That clause applies to 'any difference' whatever it may be, not settled by the parties within 48 hours of occurrence. There is nothing to limit the sweep of this language or to except any dispute or class of disputes from arbitration. In that circumstance, we must con-

[7] *United Steelworkers of America v. American Manufacturing* (1960) 363 U.S. 564 [80 S.Ct. 1343, 4 L.Ed2d 1403]; *United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574 [80 S.Ct. 1347, 4 L.Ed2d 1409]; *United Steelworkers of America v. Enterprise Wheel & Car Corp.* (1960) 363 U.S. 593 [80 S.Ct. 1358, 4 L.Ed2d 1424].

[8] (1964) 376 U.S. 543 [84 S.Ct. 909, 11 L.Ed2d 898].

[9] (1972) 406 U.S. 487 [92 S.Ct. 1710, 32 L.Ed2d 248].

> clude that the parties meant what they said--that 'any difference' which would include the issue of laches raised by respondent at trial, should be referred to the arbitrator for decision. The District Court ignored the plain meaning of the clause in deciding that issue." Id. 406 U.S. at 491.

2. The major concern of the Court of Appeals with the Union's position that the Federal Court lacked jurisdiction to issue an injunction in this matter, was made explicit both at oral argument and in its decision. That concern was that unless a *Boys Markets* injunction was available to enforce an arbitrator's award, a union could frustrate the arbitration process by simply refusing to abide by the award.

> "In our judgment *Boys Markets* cannot sensibly be construed not to cover the union's obligation to abide by the arbitrator's decision. If the process can be frustrated by such a refusal, submission to arbitration would be meaningless." (App. A at p. A-10)

The Court's concern is misplaced. *The remedy granted by the Federal District Court in this case was readily available to the SFECA through arbitration of the lawfulness of the June 27 work stoppage.*

Had the Employer "grieved" the Union's work stoppage of June 27, as it promised it would do when it agreed that all "disputes and problems" between the parties would be resolved through the contractual procedures, the matter entertained by the U.S. District Court could have been fully resolved and remedied by an arbitrator.

The Employer believed that (a) the arbitration award was *res judicata* with respect to the merits of the Union's

grievance; (b) therefore, the Union was in breach of its promise that arbitrators' awards be final and binding; and (c) that the work stoppage was in violation of the Union promise not to strike. The remedies under the contract include (a) a cease and desist order against any unlawful work stoppage and (b) damages for unlawful strikes.

The jurisdiction of the arbitrator under the SFECA/IBEW 6 contract to issue a cease and desist order can hardly be doubted. The only limitation in the contract on the arbitrator's authority is contained in Section 8 of the grievance procedure:

> ". . . this arbitrator so selected shall not have the authority to consider any matters not specifically presented to him by the Labor Management Committee."[10]

In addition, the Employer could have sought a *Boys Markets* injunction pending determination of its "grievance," because Section 9 of the parties' grievance procedure states :

> "When any matter in dispute has been referred to . . . arbitration for adjustment . . . conditions prevailing prior to the time such matter arose shall not be changed . . . until . . . a ruling has been made."

Finally, had the Employer prevailed and the arbitrator found the work stoppage unlawful, there would have been, at that point, ample authority for the Federal Court to enforce the arbitrator's cease and desist order by an injunction. As this Court stated in *Buffalo Forge*:

[10]It is clear that there need be no unanimity in the Labor-Management Committee as to issues presented to the arbitrator. See, for example, the arbitarator's decision which figures prominently in this case. The issue presented was in dispute and left to the arbitrator to decide. (App. F at p. F-2)

> ". . . were the issue arbitrated and the strike found illegal, the relevant federal statutes as construed in our cases would permit an injunction to enforce the arbitral decision. *Steelworkers v. Enterprise Corp., supra.*" 428 U.S. at 405. *See also, Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957).

3. The effect of the injunction not only resolved the issue of the lawfulness of the strike, but additionally, it denied the Union's right to have the dispute concerning the plug installation between it and SFECA processed in accordance with the parties' contract.[11] A strike to compel arbitration and a Federal Court action to compel arbitration are logical if, concededly, not emotional equivalents.[12]

Viewed as a dismissal of an "action" to compel arbitration, the District Court's injunction contravenes the strong Federal policy favoring the arbitrability of disputes.

> "That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."
>
> *United Steelworkers v. American Mfg. Co., supra,* 363 U.S. 564 at 566.

When a collective bargaining agreement, like the one in this case, requires the arbitration of all claims:

[11]The Union counterclaimed in the action below to compel arbitration.

[12]The underlying logic is gleaned from the fact that there is no Federal anti-strike policy, *Buffalo Forge, supra*; and that the Union's promise not to strike is the *quid pro quo* for the Employer's willingness to process disputes in accordance with the contract. *Boys Markets, supra.* Thus, it would appear that a Union faced with an Employer's refusal to arbitrate is possessed of two (2) lawful means of forcing arbitration; (1) to petition to compel under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185, or (2) to strike.

"The function of the court is very limited. . . . It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances, the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is a particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware. *Id.* 363 U.S. at 569.

* * *

When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of a collective bargaining agreement, it usurps a function which under the regime is entrusted to the arbitration tribunal." *Id.* 363 U.S. at 569.

To paraphrase the court in *American Mfg. Co.,* supra, 363 U.S. at 568, if the Union claims that the Company is violating a specific provision of the contract and the company denies that it is violating the provision, there is a dispute which must be arbitrated. In this case the Union claimed that the Company had violated the on-site fabrication clauses of their agreement by having Westinghouse employees insert the plugs into the fixtures. The Company

denied that it violated the agreement. There was, therefore, a "dispute" between parties. Arbitration of that dispute should not have been denied.

4. The strong Federal policy favoring the arbitrability of disputes requires, in addition, that access to the arbitration process be unfettered by questions of procedural arbitrability, *John Wiley & Sons, Inc. v. Livingston, supra.*

In *Wiley and Sons,* this court made it clear that determination of the procedural aspects affecting the duty to arbitrate is intertwined with a determination of the merits of the dispute. The logic of *Wiley and Sons* is equally applicable to this case. It was impossible for the District Court to determine whether *res judicata* was applicable to the Union's claim, without determining the merits of the Union's claim.

Res judicata may be viewed as procedural or as what it is—an affirmative defense. It is not jurisdictional.

See, Rule 8 (c) Federal Rules of Civil Procedure, 28 U.S.C.A.; *Crowe v. Cherokee Wonderland Inc.,* 379 F.2d 51 (2d Cir. 1967).

Laches is also an affirmative defense and has been specifically determined by this court to be unavailable to oust an arbitrator's jurisdiction to determine a dispute arising out of a collective bargaining agreement.

"... The Company 'was bound by the memorandum of agreement to arbitrate labor disputes within the limits of the arbitration clause.' That clause applies to 'any difference', whatever it may be not settled within 48 hours of occurrence.... In that circumstance, we must conclude that the parties meant what they said—

that 'any difference' which would include the issue of laches raised by respondent at trial, should be referred to the arbitrator for decision. The District Court ignored the plain meaning of the clause in deciding that issue."

Operating Engineers v. Flair Builders, 406 U.S. at 491.

5. The doctrine of *res judicata* is not suited to labor arbitration because labor arbitration proceedings are informal, and because of the unique function of arbitration in a labor relations context.[13]

"The choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife . . . [A]rbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement . . . arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."

United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 at 578.

* * *

"Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining

[13]See *United Electrical Radio & M. Workers v. Honeywell, Inc.,* 522 F.2d 1221 (7th Cir. 1975), *Avco Corp. v. Local U. #787 of Int. U., UAA & Imp. Wrkrs.,* 459 F.2d 968, 973-74 (3d Cir. 1972).

agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseable by molding a system of private law . . . the processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement."

Id. 363 U.S. at 581.

Therefore:

"An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

Id. 363 U.S. at 582-583.

In this case, the Union's grievance was filed in an attempt to deal with a work preservation question upon which the Arbitrator had imposed the National Labor Relations Board's right of control test. The Union was attempting to determine by its grievance the outer limits of Bank of America's exercise of control and to contain the displacement of unit work covered by its agreement to precisely the limits of that exercise of control. It was attempting to shape the contours of its agreement to meet the exigencies of the right of control doctrine. This is precisely the function which arbitration serves in labor relations. The District Court's injunction, thus treated, the arbitration award in static, litigation terms of commercial arbitration rather than in dynamic, extension-of-collective-bargaining terms sanctioned by this Court and National Labor Policy.

6. Finally, the injunction issued in this case was strictly forbidden by § 4 of the Norris-LaGuardia Act 29 U.S.C.

§ 104, unless (1) it was sanctioned by the *Boys Market v. Retail Clerks Union, supra,* exception to the Norris-LaGuardia Act or (2) to enforce an arbitration award declaring work stoppage to be in violation of the no-strike clause of the parties' agreement, *Buffalo Forge v. Steelworkers, supra.*

The Court of Appeals conceded that the mandatory prerequisites to a *Boys Market* injunction were lacking in this case, for the District Court (1) had found no arbitrable controversy and (2) had not conditioned the injunction upon the moving parties' willingness to arbitrate the underlying dispute.

The Court of Appeals asserted however, that the *Boys Markets* exception to the Norris-LaGuardia Act does apply in the circumstances of this case, because the injunction was in aid of the arbitral process, i.e., the finality of the May 26 award.

There is nothing extrinsic to the parties' agreement which declares that arbitrators' awards shall be final and binding. The final and binding effect of an award draws its essence from the contractual promises of the parties that they will regard it so. A dispute over whether a particular award has final and binding effect with respect to a subsequent claim is as arbitrable as a dispute over any other promise contained in the agreement. There is nothing in National Labor policy that ranks the finality of arbitration awards above the peaceful resolution of disputes, even disputes with regard to the finality of awards, through the parties agreed upon procedures.

Here, the arbitration machinery of the parties' agreement is fully capable of resolving and remedying that dispute, without compromising to the least degree, National Labor policy. A remedy granted by an award rendered through the contractual procedure may take the form of a cease and desist order against a strike deemed by the arbitrator to be unlawful, which award is fully enforceable in Federal Court pursuant to § 301. The arbitration machinery was not allowed, however, to function, because the Court took it upon itself to determine the dispute in direct contradiction to all the pronouncements of this Court not to.

In this case, the court determined the merits of a dispute over whether the Union breached its promises to abide by an arbitrator's award and its promise not to strike. Whether it may do so depends solely on the question of whether determination of allegations of the *res judicata* effect of awards is within the jurisdiction of the Federal Court or the arbitrator. Clearly National Labor policy dictates that whether *res judicata* effect is to be given to an award should reside in the arbitrator whose expertise is uniquely suited to resolving the parties' disputes. An expertise which ". . . [t]he ablest judge cannot be expected to bring . . . to bear upon the determination of a grievance. . ." *United Steelworkers v. Warrior & Gulf Nav. Co., supra,* 363 U.S. at 582.

To reserve jurisdiction in the U.S. District Court, as did the Court of Appeals in this case, to make such determinations is neither statutorily imperative, nor does it advance National Labor policy. Quite to the contrary, such a reservation of jurisdiction dilutes the protections of the Norris-

LaGuardia Act; contravenes the National Labor policy bias in favor of the arbitrability of disputes; and places a burden on the Federal judiciary to involve itself in ". . . hearings, findings and judicial interpretations of collective bargaining contracts." *Buffalo Forge Co. v. Steelworkers, supra,* 428 U.S. at 412. Indeed, if the preliminary injunction in this case stands, what will follow is a trial on the merits in Federal District Court both as to the Union's allegations that the plug installation work performed by Westinghouse employees violated the parties' agreement; and the Employer's allegations that the arbitration award is *res judicata* with respect to that dispute, and that, therefore, the Union breached its undertakings not to strike and to abide by arbitrator's awards.

If the Court again determines that the strike was unlawful, it must determine the measure of damages resulting from the breach of the no-strike clause.

Affirmance of the Court of Appeals decision raises the spectre of Federal Court involvement in the merits of a labor dispute every time one party or the other, claims that a prior award impinging upon the same subject matter as a current dispute is "final and binding" with respect to the dispute sought to be arbitrated. Such a result is unwarranted and unnecessary to protect National Labor policy.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth District.

Dated: September 18, 1978 at San Francisco, California.

Respectfully submitted,

JOHN L. ANDERSON,
NEYHART, ANDERSON & NUSSBAUM
Attorneys for Petitioner.

(Appendices Follow)

APPENDIX A

[577 F.2d 529]

No. 77-3455.
United States Court of Appeals
Ninth Circuit

San Francisco Electrical Contractors Association, Inc., and Collins Electric Company of San Francisco, Plaintiffs/Counter-Defendants/Appellees.

v.

International Brotherhood of Electrical Workers, Local No. 6, Defendant/Counter-Claimant/Appellant.

June 22, 1978.

On Appeal from the United States District Court
for the Northern District of California.
Before Merrill and Sneed, Circuit Judges,
and East,* District Judge.

MERRILL, Circuit Judge:

This appeal is taken from a preliminary injunction issued by the district court enjoining appellant union from engaging in strike action or work stoppage, or otherwise interfering with the installation by appellee Collins Electric Company of San Francisco of certain fixtures in a building under construction in San Francisco. Appellant union contends that the injunction is forbidden by the Norris-

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

LaGuardia Act, 29 U.S.C. §§ 101, *et seq.* Appellees contend that the injunction serves to enforce an arbitrator's award which was issued following binding arbitration engaged in pursuant to the terms of a collective bargaining agreement; that the injunction thus acts as implementation of the arbitration process and falls within an exception to Norris-LaGuardia. These opposing contentions present the issue for decision on this appeal.

I. *Facts*

In 1976, Bank of America National Trust and Savings Association was engaged in construction of a computer data center at a location in San Francisco. On April 7, 1976, appellee Collins Electric Company entered into a contract with the general contractor for installation of a lighting system. The system originally called for was a conventional system, and Collins procured the materials and fixtures required for such installation, including standard Westinghouse fixtures. In late November or early December, 1976, the Bank of America notified Collins that it wished to change its specifications from a conventional system to one including a prefabricated and fully integrated lighting and power distribution assembly called Electro/Connect, which had an approved rating from Underwriters Laboratories, Inc. (UL), as complying with the National Electrical Code and which could be connected to the Westinghouse lighting fixtures. The bank, together with its architects and engineers, sought approval from the Board of Examiners, Department of Public Works, City and County of San Francisco, for use of the system, stating:

> "The system as proposed for use in San Francisco is U.L. approved and listed and will be connected to lighting fixtures which also will be U.L. approved and listed with a plug-in feature."

It was pointed out that there would be no need to "field-cut or wire any of the lighting system connections beyond the power distribution boxes." The Board of Examiners granted approval.

Collins is a member of appellee San Francisco Electrical Contractors Association, Inc. (SFECA), which, on behalf of its members, has a collective bargaining agreement with appellant union. The contract contains a work preservation clause, an arbitration clause and a no-strike clause.[1]

Early in 1977 the union, learning of the proposed change in specifications to a prefabricated assembly which would eliminate a substantial amount of electrical work at the jobsite, advised Collins that in its view installation of Electro/Connect system would violate the work preservation provisions of its collective bargaining agreement. A grievance was filed. With SFECA representing Collins, an arbitration hearing was held on March 17, 1977. The arbitrator's deci-

---

[1]The grievance provisions in the contract state, in relevant part: "Sec. 4 During the term of this Agreement, there shall be no stoppage of work either by strike or lockout because of any proposed changes in this Agreement or dispute over matters relating to this Agreement. All such matters must be handled as stated herein.

° ° ° °

Sec. 6 Problems or disputes between the UNION and the EMPLOYER [SFECA]/Employer [the Company] shall be referred to the UNION representative and the contractor's representative. If they are unable to resolve the matter, it shall be referred to the Labor-Management Committee.

° ° ° °

Sec. 8 Should this Committee fail to agree or to adjust any matter, such shall be referred to an arbitrator ° ° °. His decision shall be final and binding ° ° °."

sion was announced May 3, 1977, to be followed by an opinion. The decision read:

> "The grievance is denied. Thus the employer may use the Electro/Connect system in the Bank of America fixture installation job at Market and Van Ness without violation of the collective bargaining agreement or the National Labor Relations Board Act."

Collins then returned the Westinghouse units to the manufacturer in order that the plugs by which the Electro/Connect assembly would be connected might be factory installed and the Westinghouse units (as well as the Electro/Connect units) thus qualify for a UL rating.

The union, claiming to be surprised at this development, filed a new grievance on May 19, 1977, contending that the proposed installation of the plugs by Westinghouse constituted a new violation of the work preservation clause.

The arbitrator's opinion on the original grievance was filed May 26, 1977. It stated, in part:

> "In the present dispute, the use of an Electro/Connect system has been prescribed by the Bank of America, the owner of the project. Collins Electric is powerless to provide the work which the Union demands unless the Bank of America is prepared to forego the use of the Electro/Connect system. Thus, in the present case, as in *Enterprise Association* [429 U.S. 507, 97 S.Ct. 891, 51 L.Ed.2d 1 (1977)] and in three of the four *National Woodwork* cases, [386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967)] the Union cannot lawfully insist upon compliance by Collins with the work preservation in the collective bargaining agreement. Collins has no control over the type of installation to be made on the project, and therefore, the pressure exerted by the Union cannot properly be said to be pressure addressed to the labor relations of Collins vis-a-vis the members of Local 6 employed by it."

SFECA then refused to recognize the union's new grievance, contending that it had already been resolved by the arbitration award.

The union then filed an unfair labor practice charge with the National Labor Relations Board, asserting that SFECA, on behalf of Collins, refused to honor the arbitration grievance provisions of the contract. The Board summarily rejected the claim, stating:

> "The investigation disclosed insufficient evidence to support the charge in that the union apparently had ample opportunity to solicit the information [that the Westinghouse unit would be factory modified] by questions during the arbitration proceeding and failed to do so. In this regard it is noted that the Union also failed to move for reopening of the arbitration proceeding even after it received the allegedly new knowledge of the nature of the work involved. Under all of these circumstances, it is concluded that further proceedings are not warranted. I am, therefore, refusing to issue complaint in this matter."

On June 24, the union sent SFECA a letter of ultimatum. It stated that, "commencing at 8:00 a.m. on Monday, June 27," IBEW Local 6 would order electricians off the Collins Electric job at the Bank of America "to protest the SFECA's refusal to participate in the Labor Management Committee process" in connection with the union's May 19, 1977, grievance. On June 27, the electricians left the Bank of America job.

On June 30, 1977, the union and SFECA stipulated to a confirmation of the May 26 arbitration award in the superior court of California. On the same day this action was commenced by SFECA seeking an injunction against the work stoppage. A temporary restraining order was issued. Hearings followed in July, 1977, resulting in the preliminary injunction from which this appeal is taken.

II. *Discussion*

Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, enacted in 1932, denies federal courts jurisdiction to issue injunctions against various concerted activities, including strikes and work stoppages "in any case involving or growing out of any labor dispute."

Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, enacted in 1947, confers jurisdiction on the federal courts, without respect to amount in controversy or citizenship of the parties, of suits for violation of contract between an employer and a bargaining representative of its employees.

Section 301 was felt to raise a question as to whether the broad language of Norris-LaGuardia was to be tempered in cases where concerted activities were in violation of the no-strike and arbitration clauses of a collective bargaining agreement. A divided court, in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962), held that Taft-Hartley had not "impliedly repealed" Norris-LaGuardia and that an injunction would not lie to halt a strike growing out of a grievance which should have been (but was not) submitted to arbitration.

Eight years later, *Sinclair* was overruled in *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970). It was there held that Norris-

LaGuardia "does not bar the granting of injunctive relief" to halt a strike and picketing pending arbitration pursuant to the grievance procedure to which the parties had agreed. 398 U.S. at 253, 90 S.Ct. at 1594.

In 1976, the *Boys Markets* holding was narrowed in *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d 1022. There it was held that a strike in violation of a contract's grievance procedure is not subject to injunction unless it has as its purpose advancing the union position upon an arbitrable grievance which has not gone to arbitration.

While this line of authority was developing it had, since 1960, been recognized that an arbitrator's decision that a strike was in violation of a contract and his order to cease and desist were subject to judicial enforcement by injunction. *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); *Pacific Maritime Association v. ILWU*, 454 F.2d 262 (9th Cir. 1971); *Alyeska Pipeline Service Co. v. Teamsters*, 557 F.2d 1263 (9th Cir. 1977). Most recently the proposition was recognized in *Buffalo Forge, supra*:

> "Furthermore, were the issue arbitrated and the strike found illegal, the relevant federal statutes as construed in our cases would permit an injunction to enforce the arbitral decision. *Steelworkers v. Enterprise Corp., supra.*"

428 U.S. at 405, 96 S.Ct. at 3147.

In the cases just cited, the arbitrator's award itself specifically considered and found improper the concerted action concerning which the injunction was sought. They did not

involve concerted action *after* an arbitrator's award which is or may be in disregard of that award as this case does. The union strenuously contends that for this reason our case is distinguishable; that to allow an injunction here would not serve to advance the goal of arbitration as a method of resolving industrial disputes. The strike, it asserts, did not have as its purpose the advancing of the union position respecting the work preservation clause. Rather its purpose was to protest the refusing of SFECA to submit that dispute to arbitration. Thus, it contends, the injunction operates to defeat the arbitration clause rather than to advance it. The company, on the other hand, contends that the injunction enforces the arbitration clause which made the arbitrator's award binding on the union.

The only Supreme Court case we have found to present the problem did not reach the question, but we feel that a discussion of the case would be useful. In *Longshoremen v. Marine Trade Association,* 389 U.S. 64, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967), a dispute had arisen as to the hours of pay to which longshoremen were entitled when, after reporting for duty, their employment was postponed ("set back") because of weather. The union contended for four hours; the association for one hour. Grievance procedures were followed, culminating in arbitration resulting in a decision favoring the association. Three months later, union members refused to unload a ship unless promised four hours pay for a "set back." The union sought to arbitrate the question. The association refused, contending that the prior award had settled the matter and established the terms of the collective bargaining agreement upon the question. The association commenced proceedings in the district

court to enforce the award. Before the court could take action the employer met the union demands. The court retained jurisdiction. Two months later, another work stoppage occurred and the association pressed the court for an order requiring the union to comply with the arbitrator's award. The union took the position that the set-back disputes were separate and distinguishable, and that the award related only to the first. The district court disagreed and ordered the union "to comply with and abide by the [said] Award." Counsel for the union sought more specific directions—"I don't know what it means." The court refused to elaborate. Further set-back disputes again disrupted work and an order was issued by the district court requiring the union and its officers to show cause why they should not be held in contempt. At the contempt hearing counsel for the union again sought to ascertain precisely what acts were proscribed by the original order and were now being asserted as violations. The court again refused to elaborate. The union was held in contempt. The court of appeals affirmed and the Supreme Court granted certiorari. Before the Supreme Court the union contended that the order amounted to an injunction illegal under *Sinclair*. The association contended (as does SFECA in the case before us) that it was no more than an enforcement of an arbitration award. The Court did not reach the question. It held that since the award itself "contains only an abstract conclusion of law, not an operative command capable of 'enforcement,' " the court's order should have supplied this specific command and in its absence was "too vague to be sustained as a valid exercise of federal judicial authority." Mr. Justice Brennan concurred in the result, reserving his disagreement with *Sinclair*. Mr. Justice Douglas concurred

in part and dissented in part. He would have distinguished *Sinclair*. Here, he noted:

> " * * * the union in fact submitted to the arbitration procedure established by the collective bargaining agreement, but, if the allegations are believed, totally frustrated the process by refusing to abide by the arbitrator's decision. Such a 'heads I win, tails you lose,' attitude plays fast and loose with the desire of Congress to encourage the peaceful and orderly settlement of labor disputes."

389 U.S. at 79, 88 S.Ct. at 209.

We note that this case preceded *Boys Markets* by three years. In our judgment *Boys Markets* cannot sensibly be construed not to cover the union's obligation to abide by the arbitrator's decision. If the process can be frustrated by such refusal, submission to arbitration would be meaningless. In our view when *Boys Markets,* in overruling *Sinclair,* adopted the sense of the *Sinclair* dissent, 398 U.S. at 249, 90 S.Ct. 1583, it also adopted the sense of Mr. Justice Douglas' language in *Marine Trade Association* as we have quoted it.

Mr. Justice Douglas would have remanded for determination of the question whether the current dispute was factually different from the earlier one on which the award was based. 389 U.S. at 79, 88 S.Ct. 201. That, to us, is the critical question here—whether the substance of the second dispute formed a part of the first dispute, and was thus resolved by the resolution of the first. If so, a refusal to submit to arbitration a question that has already been subject to arbitration can hardly be said to violate the arbitration clause. The union's insistence on arbitration under

such circumstances itself amounts to a violation of the clause through a refusal to accept the award already handed down.

The union contends that the substance of the second dispute was different from that of the first; that the question originally submitted to arbitration had only to do with the Electro/Connect assembly unit and had nothing to do with the modification of the Westinghouse unit. The district findings on this contention were flatly to the contrary.

The union contends, however, that this decision was not for the court to make. It contends that the question of how an arbitration award is to be construed should itself be resolved by arbitration; that the question remains one as to the extent of the contractual obligations and the meaning of the contractual provisions with the arbitrator's construction superimposed on the contractual language.

We cannot agree. The court is not construing the contract; it is construing the holding of a tribunal as to the contract's meaning. If, as we have held, the court is to have authority to enforce the award, it must have the authority to construe it. To hold otherwise would in effect deny the court power to enforce, since every effort made in that direction would successively and interminably require further arbitration.

This is not to say that ambiguous language may not be referred back to the author for clarification. Had that been sought here by the union this case might not be before us now. It was not sought, however, as the NLRB noted. The union instead stipulated to a confirmation of the arbitrator's award and sought a fresh start with a

new grievance, which could be presented to a new arbitrator. Nor do we preclude remand to the authoring arbitrator by the district court within its discretion when it finds the meaning of an award to be uncertain. Even accepting such judicial discretion, however, failure to remand here was not abuse.

The district court found:

> "12. There was before the arbitrator the specific question as to whether the installation of a complete Electro-Connect system was a violation of the collective bargaining agreement, and what defendant seeks herein to do is to take a portion of that installation and again engage in said grievance procedure despite the fact that the portion is part of the whole system, which point was fully discussed in its entirety before said arbitrator."

This was not clearly erroneous. The record as we have quoted it shows that the Bank of America, in specifying the Electro/Connect system, had in mind not only the Electro/Connect assembly unit with its UL certificate of approval, but also lighting fixtures with plug-in features that would themselves carry a UL certificate and eliminate any need to wire the system connections in the field. Factory modification of the Westinghouse unit was thus rendered essential, and Collins was as powerless to provide the work demanded by the union as to that unit as it was to provide that which the Electro/Connect unit itself had replaced.

We conclude that the preliminary injunction was properly issued by the district court in order to enforce the arbitrator's award.

Affirmed.

APPENDIX B

Raymond H. Levy, Inc.
A Professional Corporation
Raymond H. Levy
Truman S. Waterman (1895-1972)
600 Central Tower
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San Francisco, California 94103
Telephone (415) 362-4880
Attorneys for: Plaintiffs/Counter-Defendants/Appellees

In the United States Court of Appeals
for the Ninth Circuit

No. 77-3455

San Francisco Electrical Contractors Association, Inc., and Collins Electric Company of San Francisco,
Plaintiffs/Counter-Defendants/Appellees,

vs.

International Brotherhood of Electrical Workers, Local No. 6,
Defendant-Counter-Claimant/Appellant

[Filed July 10, 1978]

Notice of Entry of Judgment

To International Brotherhood of Electrical Workers, Local 6 and its Attorney of Record:

Please Take Notice that Judgment was filed and entered in the above entitled action on June 22, 1978

Dated: June 30, 1978

Raymond H. Levy

APPENDIX C

United States District Court
for the Northern District of California

No. C77-1417 CFP

San Francisco Electrical Contractors Association, Inc., and Collins Electric Company of San Francisco,
Plaintiffs,

vs.

International Brotherhood of Electrical Workers, Local No. 6, Does I through X,
Defendants.

[Filed August 24, 1977]

PRELIMINARY INJUNCTION

After review of supporting pleadings, affidavits and memoranda supplied by both parties, and hearing of oral arguments, and GOOD CAUSE APPEARING THEREFOR,

IT IS HEREBY ORDERED that pending the hearing on the merits of the above-captioned complaint, the defendants, and each of them, and their officers, agents, employees, representatives and all persons acting in concert or participating with them, shall be and they are hereby restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts:

1. Directly or indirectly ordering, persuading, authorizing or otherwise inducing any IBEW LOCAL 6 electrical workers to strike, picket or withhold their services or labor on the Collins Electric Company sub-contract electrical work, of any nature, on the Bank of America data center jobsite, located at Mission, Market and 11th Streets, San Francisco, California, over any dispute, grievance or communication issue in any way directly relating to the ordering, delivery, assembly or installation of the Electro Connect System, including any fixtures of any nature required or specified by the system's designer or the project owner or agents of either, to be physically assembled with, attached, or otherwise physically integrated with said system.

2. Directly or indirectly ordering, encouraging, suggesting or authorizing any acts of work stoppage, work slowdown, vandalism, harrassment, or interference with the above described work project over any of said described class of disputes or issues.

Dated: August 24, 1977

Cecil F. Poole
Judge of the District Court

APPENDIX D

In the United States District Court
for the Northern District of California

No. C-77-1417 CFP

San Francisco Electrical Contractors Association, and Collins Electric Company of San Francisco,

Plaintiffs,

vs.

International Brotherhood of Electrical Workers, Local No. 6; Does I through X,

Defendants.

International Brotherhood of Electrical Workers, Local No. 6,

Counter-Claimant,

vs.

San Francisco Electrical Contractors Association, and Collins Electric Company of San Francisco,

Counter-Defendants.

[Filed August 22, 1977]

FINDINGS OF FACT AND CONCLUSIONS OF LAW, RE: ISSUANCE OF PRELIMINARY INJUNCTION

The petition of plaintiffs SAN FRANCISCO ELECTRICAL CONTRACTORS ASSOCIATION (hereinafter re-

ferred to as SFECA) and COLLINS ELECTRIC COMPANY OF SAN FRANCISCO (hereinafter referred to as COLLINS), having regularly come on for hearing before the above entitled court on the 15th, 18th and 20th days of July, 1977, on plaintiffs' verified complaint and defendant INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL No. 6's (hereinafter referred to as LOCAL NO. 6), answer thereto; said plaintiffs appearing by and through RAYMOND H. LEVY, INC., a professional corporation, through CHRISTOPHER A. BROSE, Esq.; and defendant appearing by and through NEYHART & ANDERSON, through JOHN L. ANDERSON, Esq.; and upon the taking of evidence, both oral and documentary, the same being free from legal exception; and upon review of various memoranda filed by the respective counsel, including extensive exhibits thereto attached; and upon listening to various excerpts read into the record from the transcript of testimony before Arbitrator Adolph M. Koven;

THE COURT DOES MAKE ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW AS FOLLOWS:

FINDINGS OF FACT

1. The defendant and plaintiffs herein entered into arbitration, based upon a dispute, with Adolph M. Koven, arbitrator presiding.

2. The arbitration in question resulted in a decision in favor of plaintiffs SFECA and COLLINS and adverse to defendant LOCAL NO. 6.

3. Subsequent to said decision, said decision was confirmed by order of the Superior Court of the State of

California, in and for the City and County of San Francisco in action number 723-639.

4. After the hearing before the arbitrator was concluded, and prior to said arbitrator's decision having been rendered, and without making any effort to re-open said arbitration proceedings, defendant LOCAL NO. 6 demanded arbitration relating to whether or not the installation in a fixture by the factory of a part of the Electro-Connect system was in violation of the collective bargaining agreement between plaintiffs and defendant.

5. LOCAL NO. 6 demanded use of the grievance procedure set forth in said collective bargaining agreement to resolve this alleged dispute.

6. Plaintiffs rightfully rejected said request on the ground that the matter had already been set forth before the arbitrator, Adolph Koven.

7. Notwithstanding said rejection, defendant LOCAL NO. 6 filed with the National Labor Relations Board an unfair labor practice charge based upon said refusal to proceed with the grievance procedure as above noted.

8. Subsequent to the above rejection, the arbitrator's decision was rendered and the memorandum opinion of the arbitrator was served upon all parties thereto.

9. The claim filed before the NLRB was thereafter rejected on June 7, 1977, predicated upon the fact that the matter had been disposed of by the arbitrator.

10. Thereafter LOCAL No. 6 appealed from said decision, which appeal was denied for the same reason that it was originally denied by the regional NLRB.

11. On June 27, 1977 defendant LOCAL No. 6 wrongfully commenced a work stoppage in violation of the no-strike clause of the collective bargaining agreement, contending that it had a right to utilize the grievance procedure despite the fact that the matter had previously been concluded as above noted.

12. There was before the arbitrator the specific question as to whether the installation of a complete Electro-Connect system was a violation of the collective bargaining agreement, and what defendant seeks herein to do is to take a portion of that installation and again engage in said grievance procedure despite the fact that the portion is part of the whole system, which point was fully discussed in its entirety before said arbitrator.

13. The present alleged dispute which defendant LOCAL No. 6 seeks to have subjected to additional grievance procedures, including arbitration, consists of identical issues of a technical and economic nature that were fully encompassed by the prior dispute and arbitration, which issues were finally disposed of by the prior arbitrator's award as above noted.

14. Plaintiff SFECA is a non-profit organization duly incorporated and existing under the laws of the State of California and is the duly authorized representative and bargaining agent for a class of electrical contractors, including company plaintiff, COLLINS.

15. COLLINS is at all times pertinent, a corporation duly organized and existing under the laws of the State of California and duly licensed by the State of California as an electrical contractor.

16. This court has jurisdiction over the matters in dispute herein.

17. The result of the work stoppage at the jobsite was to threaten and subject plaintiff COLLINS and all parties relating to the particular work of improvement with substantial monetary losses, the sum of which are unascertainable at this time. Said stoppage has also subjected all other craft workers to substantial risk of harm in the absence of electrical workers on the site.

18. Plaintiff has no adequate and speedy remedy at law except by the granting of a preliminary injunction herein.

19. Heretofore this court did issue a temporary restraining order and exacted as a condition thereto an undertaking by the plaintiff, which undertaking was posted with the Clerk of this court as bond in the sum of $250.00.

20. This court finds that said undertaking should be increased to a total of $2,500.00.

21. In these Findings, This court makes no finding with respect to attorney's fees and/or costs, but reserves this issue for the trial.

CONCLUSIONS OF LAW

1. The court finds that the issues sought to be opened for grievance procedures by defendant are res judicata.

2. By virtue of the afore-referred to confirmed arbitration decision, defendant LOCAL No. 6 is barred from proceeding with any further litigation, arbitration or pursuit of any grievance procedure as to the subject matter of

said arbitration, including but without limiting the same to any disputes or alleged disputes arising out of the use, manufacture or installation of the ECS system or any of its component parts.

3. Irreparable injury will result to plaintiffs SFECA and COLLINS and to others unless a preliminary injunction is issued herein.

4. This is a proper cause for the issuance of a preliminary injunction precluding defendant LOCAL No. 6 from any further strike action, work stoppage, vandalism or other conduct dedicated to interfering with plaintiffs or any other persons relating to the use of the afore-referred to Electro-Connect system pending further order of this court.

Accordingly, a Preliminary Injunction shall be issued herein as above noted upon plaintiffs' posting further bond and undertaking, whether by way of cash or corporate surety or personal undertaking approved by this court, so that the total amount of said bond and undertaking shall be $2,500.00.

Done in open court, this 22nd day of August, 1977.

Cecil F. Poole
Judge of the Above-Entitled Court

APPENDIX E

In the United States District Court
for the Northern District of California

No. C-77-1417 CFP

San Francisco Electrical Contractors Association, Inc.; and Collins Electric Company of San Francisco,
Plaintiffs,

vs.

International Brotherhood of Electrical Workers, Local No. 6, et al.,
Defendants.

International Brotherhood of Electrical Workers, Local No. 6,
Counter-Claimant,

vs.

San Francisco Electrical Contractors Association, Inc.; and Collins Electric Company of San Francisco,
Counter-Defendants.

[Filed June 29, 1977]

DEFENDANT'S PROPOSED SUBSTITUTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 6 objects to the proposed Findings of Fact and Conclusions of Law filed herein by plaintiffs on July 22, 1977, and moves the Court

to substitute defendant's proposed Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. The SAN FRANCISCO ELECTRICAL CONTRACTORS ASSOCIATION, INC. ("SFECA") is a non-profit organization, incorporated and existing under the laws of the State of California, which exists for the purposes of representing employers in the electrical construction industry, including plaintiff COLLINS ELECTRIC COMPANY OF SAN FRANCISCO ("Collins" or "Collins Electric"), in collective bargaining and labor relations.

2. Collins is a corporation duly organized and existing under the laws of the State of California and licensed as an electrical contractor.

3. Defendant INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 6 ("I.B.E.W. Local 6"), is a labor organization within the meaning of section 2(5) of the National Labor Relations Act, 29 U.S.C. section 152(5).

4. SFECA and I.B.E.W. Local 6 are parties to a collective bargaining agreement, which contains grievance and arbitration provisions and a no-strike, no-lockout provision. The full text of the grievance and dispute resolution sections read as follows:

GRIEVANCE—DISPUTES

"Sec. 4. During the term of this Agreement, there shall be no stoppage of work either by strike or lockout because of any proposed changes in this Agreement or dispute over matters relating to this

Agreement. All such matters must be handled as stated herein.

"However, no part of this Agreement is to be interpreted as requiring members of the Union to work behind a recognized picket line or where strike, lockout or other conditions detrimental to the interest of the Local Union prevail.

"Sec. 5. There shall be a Joint Labor-Management Committee of four (4) who shall be chosen by the Local Union, and four (4) representing the EMPLOYER who shall be chosen by the San Francisco Electrical Contractors Association, Inc. It shall meet regularly at such times as it may decide. It shall also meet within forty-eight (48) hours, Saturday, Sundays and Holidays excluded, after notice is given by either party. It shall select its own Chairman and Secretary.

"Sec. 6. Problems or disputes between the UNION and the EMPLOYER/Employer shall be referred to the UNION representative and the contractor's representative. If they are unable to resolve the matter, it shall be referred to the Labor-Management Committee.

"Sec. 7. All matters coming before the Committee shall be decided by a majority vote. Two (2) members from each of the parties hereto shall constitute a quorum, but each party shall have the right to cast the full vote of its membership, and it shall be counted as though all were present and voting.

"Sec. 8. Should this Committee fail to agree or to adjust any matter, such shall then be referred to an arbitrator selected by lot from the following mutually agreed names:

J. Keith Mann	David Feller
Robert Burns	Sam Kagel
Adolph Koven	

"His decisions shall be final and binding. This arbitrator so selected shall not have the authority to consider any matters other than those specifically presented to him by the Labor-Management Committee.

"Sec. 9. When any matter in dispute has been referred to conciliation or arbitration for adjustment, the provisions and conditions prevailing prior to the time such matter arose shall not be changed or abrogated until agreement has been reached or a ruling has been made."

5. Both parties to the collective bargaining agreement are required by the grievance and dispute provisions of their agreement to resolve disputes or problems which arise between them relating to their agreement exclusively through the grievance and dispute provisions of the contract.

6. On or about January 13, 1977, I.B.E.W. Local 6 invoked the grievance and dispute provisions of the agreement between the parties to protest the use by Collins of a prefabricated distribution and lighting system known as Electro/Connect, in connection with the electrical construction work which Collins had been awarded at the Bank of America Computer Data Center being erected at Market and Eleventh Streets in San Francisco. Defendant I.B.E.W. Local 6 took the position that the use of the Electro/Connect system by Collins Electric violated the work preservation provisions contained in the parties' agreement. It additionally alleged that the impact of the use of the system upon employment opportunities of members of the collective bargaining unit required notice to, and bargaining with, the Union within the meaning of section 8(d) of

the National Labor Relations Act, 29 U.S.C. section 158(d), regarding the decision to use the Electro/Connect system.

7. On or about March 17, 1977, prior to the delivery of the Electro/Connect system to the Bank of America jobsite, an arbitration hearing was held on the dispute before Arbitrator Adolph Koven.

8. Plaintiffs contended during the arbitration hearing that the use of the system was not a violation of the collective bargaining agreement, by virtue of the National Labor Relations Board's right to control test recently affirmed by the Supreme Court of the United States in *N.L.R.B. v. Pipefitters Local 638 (Enterprise Ass'n.)*, 429 U.S. 507, 51 L.Ed.2d 1 (1977).

9. On or about May 5, 1977, the arbitrator rendered a preliminary award, stating that it was not a violation of the National Labor Relations Act or of the collective bargaining agreement for Collins to install the Electro/Connect system at the Bank of America. This May 5 preliminary award was supplemented on May 26, 1977, by the full decision and award in which the arbitrator found that the use of the Electro/Connect system at the Bank of America had been a decision within the exclusive control of Bank of America and not Collins Electric, and, therefore, Collins Electric was excused from its obligation under the contract and the National Labor Relations Act by virtue of the "right to control" doctrine.

10. From May 5, 1977, until June 27, 1977, installation of the Electro/Connect system at the Bank of America proceeded without interruption.

11. On May 19, 1977, I.B.E.W. Local 6 wrote to the SFECA requesting convening of the Labor-Management Committee in accordance with section 6 of Article I of the agreement between the parties, in order to discuss the alleged violation of the agreement by Collins, to wit:

> "Local Union No. 6, I.B.E.W. contends that Collins Electric Company has violated the 'Scope of Agreement' and Section 3 of Article II of the Agreement.
>
> "The alleged violation occurred as follows: Collins Electric Company contracted out the installation of receptacles that have been installed in the Westinghouse lighting fixtures for use in the Electroconnect plug system which is being installed on the above indicated job.
>
> "Local Union No. 6 contends this is a violation of the Agreement which has been upheld by the Labor-Management Committee at various times including their meeting of April 5, 1966, in which they ruled—'The lighting fixtures shall be delivered with no preassembled fittings'.
>
> "Local Union No. 6 seeks as a remedy for this violation the following alternative solutions:
>
> "1. An amount of wages and fringes equal to the amount of time that was used to install these receptacles in the lighting fixtures to be paid to the top people on the out-of-work list who were denied employment through this violation.
>
> "2. The receptacles of the lighting fixtures be removed and reinstalled by employees covered by the Inside Wiremen Agreement on the job site."

12. On June 2, 1977, the SFECA answered the May 19 letter by stating:

> "The lighting fixtures, as to which you claim a dispute exists, were part and parcel of the dispute you filed on January 27, 1977 and which was subsequently resolved by arbitration. The award of Arbitrator Adolph M. Koven resolved this matter."

On the basis of its position that the matter had been resolved by the May 26, 1977 arbitration award, the SFECA refused to participate in the grievance procedure.

13. Between June 2, and June 24, 1977, Franz Glen, Business Manager of I.B.E.W. Local 6, attempted, through the auspices of the International Union and the SFECA's national organization, to persuade the SFECA to participate in the dispute resolution procedures outlined in the contract in connection with its May 19 grievance.

14. The SFECA, however, continued to refuse to process the May 19 grievance on the grounds that the matter had been resolved by the May 26 arbitration award.

15. On June 24, 1977, Mr. Glen hand-delivered to Mr. Bart Dixon, the Executive Manager of the SFECA, a letter stating:

> "Commencing at 8:00 a.m. on Monday, June 27, 1977, I.B.E.W. Local 6 shall withdraw and withhold men from the Collins Electric job at the Bank of America at 11th and Market Streets in San Francisco. The only purposes of this economic action are as follows:
>
> "1. To protest the San Francisco Electrical Contractors Association's refusal to participate in the labor management committee process con-

tained in the Agreement, and which we invoked on May 19, 1977. Our attorney has advised us that we are relieved of our obligation to forego self-help in this matter as you have refused to participate in the dispute resolution machinery contained in the Agreement.

"2. To protest Collins' unfair labor practices, to wit: Collins' refusal to furnish information concerning the modification of the Westinghouse fixtures to be used in the Bank of America job, so that I.B.E.W. Local 6 may determine at whose instance the modification work was performed. We wish to avoid any action which would violate the National Labor Relations Act under the Board's right to control doctrine and to determine under that doctrine whether the modification work constitutes a violation of our Agreement.

"We will immediately request Collins' electrician employees to return to work upon your agreement to process our May 19, 1977 grievance through the contractual procedures."

16. On June 27, 1977, Bart Dixon of the SFECA had hand-delivered to Mr. Glen a letter reiterating the SFECA's view that the May 19 grievance had been covered by the May 26 arbitration award.

17. On June 27, 1977, I.B.E.W. Local 6 ordered the electrician employees of Collins Electric off the Bank of America jobsite. I.B.E.W. Local 6 did not post pickets at the jobsite.

18. On or about June 30, 1977, SFECA and I.B.E.W. Local 6, through their respective counsel, stipulated to the

confirmation of the May 26, 1977 arbitration award in Case No. 723-639 in the Superior Court of the State of California, for the City and County of San Francisco.

19. On the afternoon of June 30, 1977, the SFECA filed the within action in this Court and sought a Temporary Restraining Order against the withdrawal of Collins' electrician employees from the Bank of America job.

20. After argument by respective counsel before United States District Judge William Schwarzer, Judge Schwarzer signed an Order to Show Cause and a Temporary Restraining Order as follows:

"IT IS FURTHER ORDERED that pending the hearing and determination of said order to show cause, the defendants, and each of them, and their officers, agents, employees, representatives and all persons acting in concert or participating with them, shall be and they are hereby restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts:

"1. directly or indirectly ordering, persuading, authorizing or otherwise inducing any IBEW LOCAL 6 electrical workers to strike, picket or withhold their services or labor on the Collins Electric Company sub-contract electrical work, of any nature, on the Bank of America data center jobsite, located at Mission, Market and 11th Streets, San Francisco, California.

"2. directly or indirectly ordering, encouraging, suggesting or authorizing any acts of work stoppage, work slow-down, vandalism, harrassment, or interference with the above described work project."

21. Neither the SFECA nor Collins Electric has attempted to process, through the grievance and dispute provisions of the parties' agreement, their claim that the withdrawal of employees from the Bank of America job on June 27 violated the agreement.

22. On July 15, 18, and 20, 1977, hearings on the Order to Show Cause were held in this Court.

23. At the outset of the hearing, counsel for defendant moved to dissolve the Temporary Restraining Order on grounds that the Order did not comply with sections 7 and 9 of the Norris-LaGuardia Act, 29 U.S.C. sections 107 and 109. Counsel for defendant further moved that, insofar as the Complaint in this action could be construed as an attempt to enforce the arbitration award under section 301, 29 U.S.C. section 185, to that extent the Complaint be dismissed on grounds that the award had already been enforced in the Superior Court of the State of California.

24. At the hearing, oral and documentary evidence was taken which produced the above facts and the following:

(a) Electro/Connect receptacles manufactured by Emerson Electric were shipped to a Westinghouse factory in Mississippi, where the receptacles were inserted in standard Westinghouse fixtures by Westinghouse employees.

(b) George Clyne, President of Collins Electric, testified that in ordering Westinghouse to insert the Electro/Connect receptacles in the fixtures he was merely carrying out the spirit of the Bank of America order to use the Electro/Connect system.

(c) Franz Glen testified that, in a telephone conversation with Clyne on March 30, 1977, Clyne had informed him that the decision to have the Electro/Connect receptacles inserted in the Westinghouse fixtures by Westinghouse employees rather than at the jobsite by Collins' employees was entirely Collins', not Bank of America's.

(d) Clyne testified that Underwriters Laboratory certification required that the receptacles be inserted in the fixtures at a factory rather than at a jobsite.

(e) Glen testified that the Underwriters Laboratory specifications on which Clyne relied did not require factory installation of the receptacles, but merely required that the receptacles be used only in combination with fixtures approved by Underwriters Laboratory. Glen testified that there was nothing in the Underwriters Laboratory requirements that prevented installation of the receptacles at the jobsite.

25. The positions of the parties at the hearing were as follows:

(a) Plaintiffs asserted that the subject matter of the May 19, 1977 grievance was conclusively determined by the May 26, 1977, arbitration award. That is, that the May 26 arbitration award was *res judicata* with respect to the issue raised by the Union regarding installation of the Electro/Connect receptacles into the Westinghouse fixtures. Thus, it was under no duty to process the May 19 grievance through the grievance and disputes provisions of the agreement.

(b) Defendant took the position that the May 26 arbitration award is conclusive only as to the issue of whether

the Electro/Connect system may be installed at all. It contended that the May 19 grievance raises an issue of the manner of installation. That is, the arbitrator having determined that the system may be installed, the question raised is whether certain work in connection with the installation must be done under the parties' agreement, or whether it may be subcontracted to employees of Westinghouse.

(c) Defendant additionally contended (1) that whether the prior arbitration decision is *res judicata* is a question to be determined by the processes contained in the parties' agreement, because *res judicata* is an equitable defense and the parties' contract requires any and all disputes to be resolved through the contractual procedures; (2) that, in any case, the work stoppage sought to be enjoined was not called for the purpose of enforcing defendant's views as to the merits of the May 19 grievance, but for the limited object of requiring plaintiffs to process the grievance. Thus, defendant urged, to the extent that such an object is a violation of the parties' contract, plaintiffs' remedy lies in submitting that allegation to the contractual adjudication mechanism of the parties' contract; (3) that, to the extent that plaintiffs seek enforcement of the May 26 arbitration award, this Court lacks jurisdiction under section 301, 29 U.S.C. section 185, by reason of the fact that the award merged into the judgment of the state court; thus, only the state court judgment exists for the purposes of enforcement, which enforcement may not be had through a section 301 action, but only by an action on the judgment (contempt) in the court which issued the enforcement order.

CONCLUSIONS OF LAW

1. Section 9 of the Norris-LaGuardia Act, 29 U.S.C. section 109, provides that:

> "No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter."

Two Circuit Courts have specifically stated that, with respect to the issuance of *Boys Markets* injunctions, findings of fact made and entered by the court and an injunction tailored to those findings are required before an injunction may be deemed valid. *United States Steel Corp. v. United Mine Workers of America,* 534 F.2d 1063 (3d Cir. 1976); *New York Telephone Co. v. Communication Workers of America,* 445 F.2d 39 (2d Cir. 1971). In addition, both the Sixth and Ninth Circuits have adopted the view that section 9 of the Norris-LaGuardia Act applies to *Boys Markets* injunctions without specifically so stating. The Ninth Circuit, in *Donovan Construction Co. v. Construction P. & M. Lab. Union No. 383,* 533 F.2d 481 (9th Cir. 1976), for example, has stated that:

> "The events and circumstances leading to the *Boys Markets* decision are by now so familiar as to make a

full recitation of them unnecessary. We pause only to repeat that the accomodation reached by the Supreme Court between the anti-injunction provisions of the Norris-LaGuardia Act and section 301 of the Labor Management Relations Act is restricted to a closely circumscribed class of cases, and that injunctive relief issued thereby must be conditioned upon a detailed set of findings." *Id.*, 533 F.2d at 485.

In this case, a Temporary Restraining Order was issued without any findings of fact, and the Injunction itself proscribed work stoppages for any reason whatsoever for as long as Collins Electric Company performed its subcontract of electrical work at the Bank of America Data Center at Market and Eleventh Streets in San Francisco. Further, the Restraining Order enjoined Union officials from ordering, encouraging, suggesting or authorizing work slow downs, vandalism, harrassment or interference in connection with any work being performed by Collins. There are no facts in the record to suggest that defendant ever did, or contemplated doing, any of the aforementioned acts. For this reason alone, the Temporary Restraining Order issued June 30, 1977, must be dissolved.

2. This Court does not have jurisdiction under section 301 of the Labor Management Relations Act, 29 U.S.C. section 185, to enforce the May 26, 1977 arbitration award; nor, in actuality, has it been asked to do so by plaintiffs in this case. While jurisdiction under section 301 to issue injunctions or specific enforcement of an arbitration award may lie under the *Lincoln Mills-Boys Markets* exception to the Norris-LaGuardia Act, such an injunction does not lie in this case as enforcement of the May 26

award has already been sought in, and been granted by, the Superior Court of the State of California. Thus, the award, as a judgment of the California Superior Court, is by operation of California law enforceable only in the California Superior Court. California Code of Civil Procedure §§ 1287.4, 1209(5); 5 Witkin, *California Procedure*, "Enforcement of Judgments," §§ 157, 158, pp. 3519-20. There is no section 301 jurisdiction to enforce state court judgments.

3. Nor is there section 301 jurisdiction to enjoin the work stoppage of June 27, 1977, even if the action brought by plaintiffs here were an enforcement action and injunctive relief might lie incident to enforcement jurisdiction. The facts do not reveal that the work stoppage of June 27, 1977 was called for the purposes of avoiding the May 26 award. Rather, the undisputed facts in the record demonstrate that the work stoppage was called for the limited purpose of requiring the employer to participate in the contractual grievance procedure in connection with the May 19, 1977 grievance filed by defendant. Given the all-inclusive language of the parties' grievance and disputes clause, and given the fact that both parties are required to submit problems and disputes for resolution through that procedure, whether or not the work stoppage of June 27 violated the no-strike clause is, in and of itself, an arbitrable matter. The plaintiffs in this case have not invoked that arbitration machinery and, thus, this Court has no jurisdiction under section 301 to enjoin the work stoppage. *Amalgamated Transit Union, Div. 1384 v. Greyhound Lines,* 529 F.2d. 1073 (9th Cir., vacated and remanded 429 U.S. 807, 50 L.Ed.2d 68 (1976), rev'd on

other grounds 550 F.2d 1237 (9th Cir. 1977); *Buffalo Forge v. United Steelworkers of America,* 428 U.S. 397, 49 L.Ed.2d 1022 (1976).

4. Plaintiffs take the position that they are not required to process the May 19, 1977 grievance by virtue of their contention that the matters encompassed in the May 19 grievance were resolved by the May 26, 1977 arbitration award. In short, the employers allege that the May 26 arbitration award is *res judicata* with respect to the issue raised by the Union. *Res judicata* is an equitable defense. The doctrine does not deprive the contractual forum in this instance of jurisdiction. 50 C.J.S. § 822, pp. 389, 392; *Operating Engineers v. Flair Builders,* 406 U.S. 487 (1972).

Given the conflict of testimony in this case, the conflict between the parties as to the proper interpretation to be placed upon the May 26 arbitration award, and the all-inclusive language contained in the parties' agreement, it cannot be said that the Union's position, that the May 19 grievance raises an issue of contract violation, is wholly without merit. Thus, based upon the teaching of the Supreme Court in the *Steelworkers Trilogy* and its progeny, it cannot be said that the Union has not raised an issue which is subject to the grievance machinery contained in the parties' agreement.

At least three Circuits have questioned the application of traditional notions of *res judicata* to the more informal arbitral process. Thus, the courts have required a strict identity of facts and issues as a basis on which to allow a party to avoid arbitration of a dispute which it claims is covered by a prior arbitration award. *U.A.W. v. Weather-*

head Co., 216 F.Supp. 612, aff'd 316 F.2d 239 (6th Cir. 1962); *United Electrical Radio & M. Workers v. Honeywell, Inc.,* 522 F.2d 1221 (7th Cir. 1975); *Avco Corp. v. Local U. #787 of Int. U., U.A., A. & A. Imp. Wkrs.,* 459 F.2d 968 (3d Cir. 1972).

Thus, it would not advance the national labor policy that labor disputes be resolved through agreed-upon methods for this Court to rule that judicial notions of *res judicata* should be applied to insulate a party from resolving an issue that is arbitrable on its face through those agreed-upon methods.

5. Finally, this Court, prior to issuing an injunction, must first determine that the plaintiffs would be harmed more by the failure to grant an injunction than the defendant would be by its issuance, and that failure to enjoin defendant would result in irreparable harm to plaintiffs. *Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, supra.* Neither of these equitable considerations weighs in favor of plaintiffs. First, an injunction would deprive the Union entirely of its bargain that it would forego striking in return for the employer's promise that it would adjudicate "problems and disputes" arising between them exclusively through the contractual dispute resolution machinery. An injunction against the Union would deprive it both of the right to have its complaint heard in the agreed-upon forum, and of its right to strike. On the other hand, the employer is not irreparably harmed by the failure to grant an injunction. It has the following remedies at law available to it. First, if it believes the strike was in derogation of the May 26 arbitration award, it is at perfect liberty to file a contempt

action in state court based upon the state court judgment confirming the award. Second, the employer may file its own grievance under the contract, alleging that the strike to force it to arbitrate the May 19 grievance violated the no-strike pledge contained in the agreement, in that the strike was in derogation of the Union's promise in Article I, section 8, of the agreement to honor arbitrators' awards as final and binding. There is nothing in the law that precludes an arbitrator from awarding damages to an employer for a union's breach of a no-strike clause, provided an arbitrator has jurisdiction, as he does here, under the broad grievance and disputes language of the parties' agreement, to hear employer grievances. *Buffalo Forge v. United Steelworkers, supra.*

For all of the above reasons, the Court shall dissolve the Temporary Restraining Order and decline to grant plaintiffs' application for a Preliminary Injunction. Defendant is awarded its costs of defense and reasonable attorneys' fees, to be determined after notice and motion for same by counsel for defendant.

Dated: ....., 1977.

United States District Judge

APPENDIX F

In Arbitration Proceedings Pursuant to Section 8 of the Current Collective Bargaining Agreement Between the Parties

In the Matter of a Controversy

between

Local No. 6, International Brotherhood of Electrical Workers,

and

San Francisco Electrical Contractors Association, Inc.,

Involving installation of Electro/Connect system by Collins Electric Company.

ARBITRATOR'S OPINION AND AWARD

This Arbitration arises pursuant to Section 8 of the Collective Bargaining Agreement between LOCAL NO. 6, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, hereinafter referred to as the "Union," and the SAN FRANCISCO ELECTRICAL CONTRACTORS ASSOCIATION, INC., hereinafter referred to as the "Association," under which ADOLPH M. KOVEN was selected to serve as Arbitrator, and under which his decision would be final and binding upon the parties.

Hearing was held in San Francisco, California, on March 17, 1977. Pursuant to a request made on the record by the parties, an Award was issued in this matter on May

3, 1977. Prior to the issuance of the Award, the parties were afforded full opportunity to present their positions through witnesses, oral argument, and relevant exhibits. The parties filed post-hearing briefs which were considered by the Arbitrator in issuing the Award.

APPEARANCES:

On behalf of the Union:

JOHN L. ANDERSON, ESQ.
Neyhart & Anderson
100 Bush Street, Suite 2600
San Francisco, California 94104

On behalf of the Association:

RAYMOND H. LEVY, ESQ.
Raymond H. Levy, Inc.
600 Central Tower
703 Market Street
San Francisco, California 94103

ISSUE

The parties were unable to agree upon a statement of the issue. The Union couched the issue in the following language:

> [W]hether or not the use of the Electro/Connect system in the Bank of America fixture installation job at Market and Van Ness in San Francisco [would violate] the Collective Bargaining Agreement or the National Labor Relations Act.

The Company states the issues as follows:

> [W]hether or not under the terms of the Agreement Collins Electric shall be permitted to comply with the owner's instructions to install the Electro/Connect.

RELEVANT CONTRACT PROVISIONS

Scope of Agreement

Electrical work as covered by this Agreement shall include the handling or moving of all related materials and equipment from the first point of delivery at the job site through the final installation, and the dismantling and removing of the electrical material from the job site, including all work historically performed by employees covered by this Agreement. This shall also include such work on the job site as welding, burning, brazing, bending, drilling and shaping of all metal brackets, supports, fittings and other fabrication that are specific parts of the installation of the electrical work and equipment on the job site.

Article IV, Section 22

All cord drops, molding and conduit work must be made up and prepared on the job, except on any one job two pieces of conduit may be cut and threaded at the shop by the journeyman doing said work.

BACKGROUND:

Collins Electric Co., herein called the "Company," is a member of the San Francisco Electrical Contractors Association and is covered by the Agreement between the Association and the Union.

Sometime prior to April 2, 1976, Collins was the successful bidder for a job calling for the installation of a conventionally wired lighting system for the Bank of America National Trust and Savings Association construction of data center facilities at Eleventh and Market Streets in San Francisco. Thereafter, on April 2, 1976, Collins entered into an agreement with Dinwiddie Construction Co., the general contractor, to provide electrical work and

installation of Westinghouse fixtures in accordance with the plans and specifications prepared by Skidmore, Owings & Merrill, the architect. Paragraph 13 of the Dinwiddie-Collins Agreement provides:

> 13. *Extras:* Contractor shall be at liberty at any time, either before the commencement or during the construction of this work, to order any extra work to be done or to make any change, whether such changes increase or diminish the work to be done. No alteration shall be made on the work except upon written order of Contractor. . . . All clauses of this Subcontract shall apply to any changes or extra work in like manner, and to the same extent as to the work contracted for, and no changes or extra work shall annul or invalidate this Subcontract.

In late November or early December 1976, the Bank of America notified Collins that they desired to install, as denoted by Underwriters Laboratories, Inc., a prefabricated lighting and power distribution assembly called Electro/Connect on the project instead of a conventional installation. At the time when Collins received this notification, it had already procured all the fixtures and material required for the conventional installation. The Bank of America, the architect and Bentley Engineers, Inc. sought and obtained approval from the Board of Examiners, Department of Public Works, City and County of San Francisco, for the use of the Electro/Connect system. Collins was not involved in and did not participate in those proceedings.

By letter of January 13, 1977, the Union notified Collins that installation of an Electro/Connect system would violate the Collective Bargaining Contract.

Union Testimony Regarding Work Elimination:

A system such as the Electro/Connect system has never before been installed in the City and County of San Francisco. Normally, a project similar to the Bank of America job would require that employees covered by the Contract perform the following work: installing a main distribution panel on a specific floor or a nearby floor; piping conduit or steel tubing from the distribution panel to junction boxes; pulling wire into the junction boxes, a two-man operation; cutting flexes in lengths of from four to six feet and fitting each piece at either end with a flex connector, threading the flex with three wires and installing into a junction box; attaching the junction boxes to the ceiling either with screws or by power driven metal pins; splicing the wires from the flex and the wires coming into the junction box from the distribution panel; closing the junction boxes; assembling the fixtures, attaching the fixture to the flex and splicing the fixture wires to those in the flex; and putting the cover on the fixture and installing the light tubes and defuser.

Based upon a description of the Electro/Connect system as set forth in the manufacturer's brochure, a Union witness estimated that 90% of the work described above would be eliminated if Electro/Connect were used.

Testimony Regarding Labor-Saving Techniques:

Union Testimony:

Approximately ten years ago a dispute arose between the Association and the Union over prefabricated or preassembled fixtures on a Bank of California job. On that job the fixtures arrived with the tubes inserted; the de-

fusers already installed in the fixtures; the flexible conduit installed; and the wiring in the flexible conduit and the splicing having been completed. As a result of the Union's protest regarding the use of preassembled fixtures, the fixtures were disassembled, rewired correctly and then installed.

Also about ten years ago a dispute arose between the Association and the Union on a P.G.&E. building project at Beale Street in connection with fixtures which arrived at the job site with the lamps and defusers already installed. The Union prevailed in the dispute, and the defusers and lamps were removed at the job site and reinstalled by members of Local 6.

In 1966, a dispute arose in respect to the installation of preassembled lighting fixtures at the Fox Plaza. The fixtures arrived complete with flex, wiring and internal wiring. A Labor-Management Committee meeting was held in reference to the dispute, and the Committee found that the installation of such fixtures was in violation of the Agreement. A communication to that effect was distributed by the Association throughout the industry.

In September 1971, a dispute arose regarding Fischbach & Moore's use of prefabricated sweep elbows. The elbows were regarded as having been prefabricated because they were not normal radius elbows. The elbows were taken off, and the conduit was bent on the job site.

Company Testimony:

Over the years many significant labor-saving devices have come into use without Union objection. Examples

of such devices are as follows: prefabricated switchboards; quick connector plates; installation of fixture doors and lenses before shipment to the job site; substitution of wire nuts for solder; and floor ducts.

A Company witness testified that prefabrication under the Contract deals with the assembly of component parts at a location other than the job site. The Electro/Connect installation involves merely the use of a standard catalog item shipped to the job site in its completed form without involvement in any assembly of component parts.

POSITION OF UNION:

(1) The core issue is whether Collins Electric may use Electro/Connect to install some 11,000 fixtures at the Bank of America.

(2) According to the Underwriters Laboratories (UL), Electro/Connect is a prefabricated lighting and power distribution assembly. It is totally prefabricated prior to delivery to the job site.

(3) The unilateral determination to use this product is a violation of the National Labor Relations Act and the "Scope" clause and Article IV, Section 22, of the Contract. The Scope clause defines unit work as all work historically performed by employees covered by the Agreement. Article IV, Section 22, as interpreted by the parties, prohibits off-site fabrication of parts of the electrical installation work. Use of the Electro/Connect system constitutes a unilateral contracting out of all branch wiring work historically performed by workers under the Contract.

(4) If this system can be used, its effect upon the Collective Bargaining Contract would be to remove from under the Contract 70% of the unit work performed in the installation of commercial lighting.

(5) The cited Contract sections have historically been accepted by the parties as requiring on-site fabrication of fixture installations in the fixtures themselves and precluding the use of devices which diminish the work opportunities historically performed at the job site. Article IV, Section 22, though couched in terms of cord drops and molding, now both archaic terms, has been interpreted as applying to all fabrication work normally and historically performed at the job site.

(6) A labor-management committee decision of April 5, 1966, stating that "All employers be notified that on all work or jobs closing or bid on or after April 15, 1966, the lighting fixtures shall be delivered with no preassembled fittings, wiring, or other material that is normally part of the installation process. This shall include such items as flex connectors, pigtails, etc." is controlling with respect to this dispute.

(7) In 1975, the Association attempted to amend the Contract to allow off-site fabrication by proposing revisions of Article II, Section 11, to allow off-site fabrication and by proposing the deletion of Article IV, Section 22, of the Agreement. Neither Section was deleted nor revised as the result of these proposals.

POSITION OF COMPANY:

(1) The recent Supreme Court case of *National Labor Relations Board v. Enterprise Association, NLRB v.*

Plumbers Local 638 (Enterprise Association), U.S. Supreme Court No. 75-777, February 22, 1977, holds that what the Union is doing in the present dispute is a violation of the National Labor Relations Act and amounts to a secondary boycott.

(2) The International Union is a party to the Contract in question. No Contract with Local 6 is valid until approved by the International. Therefore the conduct of other locals under the International becomes important in interpreting what is proper under the Contract as to what Local 6 might consider proper.

(3) The system which is involved here is not "prefabricated" within the meaning of that term in the Collective Bargaining Contract.

(4) The Collective Bargaining Contract provides that it is the policy of the Union and the workmen it represents to promote the use of materials and equipment manufactured, processed, or repaired under IBEW contracts. The language is not restricted to the jurisdiction of San Francisco. The system in question is "IBEW Union made."

(5) The items involved are standard catalog items. Only the San Francisco local has raised a question with respect to whether such items can be used. They have been utilized in other parts of the country, including the IBEW Union hall in Daytona Beach, Florida.

(6) Section 22 of the Contract (Article IV) is not applicable to this dispute since the dispute does not involve drop cords, molding or conduit.

(7) The Scope of Agreement section in the Contract can be enforced only against those parties who are signatory to the Union Agreement. It cannot be imposed against either the factory, the owner, or the contractor.

DISCUSSION AND CONCLUSIONS:

Two legal questions are put in issue in this dispute: (1) Whether the "Scope of Agreement" clause in the Contract may be given effect to prohibit the installation of the Electro/Connect lighting system; and (2) if so, did the Company violate the "Scope" clause by attempting to install an Electro/Connect lighting system.

Quite properly the validity of the "Scope" clause as a work preservation clause is not challenged by the Company. However, the propriety of giving effect to the clause in the present dispute is subject to challenge in view of two Supreme Court cases: *National Woodwork Manufacturers Assn. v. NLRB,* 386 U.S. 612 (1967) and *NLRB v. Plumbers Local 638 (Enterprise Assn.),* U.S. Supreme Court, No. 75-777, February 22, 1977. In *National Woodwork* the Union induced the employees of four contractors to cease handling prefabricated doors arriving at the job sites. In three of the four instances, the use of the doors was dictated by the architect or the owner, and in these cases, the Board found that the Union conduct was not immunized by the Contract's work preservation clause. In the fourth situation (Frouge) the contractor opted to use the prefab doors; thus, he was in a position to resolve the labor dispute by reversing his decision. In this fact situation, the NLRB found the Union's action to be primary activity.

In *NLRB v. Plumbers Local 638,* a plumbing subcontractor had a contract with the general contractor to perform the heating, ventilation and air-conditioning work on a home for the aged. The subcontract job specifications provided that the general would purchase climate control units with prefabricated internal piping. When the subcontractor entered into its agreement with the general it was aware that its employees would have to make installations where the cutting and threading work had already been completed. The collective bargaining agreement between the sub and the union provided that all pipe threading and cutting were to be performed at the job site. There was no question but that the work that the general designated to be prefabricated was the kind of work covered by the collective bargaining agreement. When the merchandise arrived at the job site, Local 638 members refused to install it on the ground that their collective bargaining agreement had been breached. The general contractor filed unfair labor practice charges against the union.

The NLRB found a violation of the statute, holding that although the clause was valid and the refusal to install the work was based upon a valid clause, its application under the circumstances was improper because the union was exerting pressure on the subcontractor in order to pressure the general contractor, and that the object of the pressure was to get the general contractor to cease using the prefabricated merchandise.

The Supreme Court held that the existence of a work preservation clause in a contract is not an adequate defense to a secondary boycott unfair labor practice

charge. The test of whether a strike or refusal to handle which is grounded on a work preservation clause is primary activity or secondary activity is whether the pressure is addressed to the labor relations of the employer party to the collective bargaining contract *vis-à-vis* his own employees. If so, it is primary activity; however, if the pressure is "technically calculated to satisfy union objectives elsewhere" it is unlawful secondary pressure. The Supreme Court agreed with the findings of the Administrative Law Judge to the effect that because the general contractor specified a prefabricated product, there was no job site work of the kind covered by the contract to be performed, and none could be obtained by pressure on the subcontractor alone, and until the general contractor changes the job's specifications to provide the work for those covered by the contractor.

In the present dispute, the use of an Electro/Connect system has been prescribed by the Bank of America, the owner of the project. Collins Electric is powerless to provide the work which the Union demands unless the Bank of America is prepared to forego the use of the Electro/Connect system. Thus, in the present case, as in *Enterprise Association* and in three or the four *National Woodwork* cases, the Union cannot lawfully insist upon compliance by Collins with the work preservation in the collective bargaining agreement. Collins has no control over the type of installation to be made on the project, and therefore, the pressure exerted by the Union cannot properly be said to be pressure addressed to the labor relations of Collins *vis-à-vis* the members of Local 6 employed by it.

Counsel for the Union seeks to distinguish the *Enterprise* and *National Woodwork* cases by arguing:

> (1) The right to control test contemplates a situation in which the contracting employer never had control over the work in question, ". . . No past, present or future authority to award . . ." the work. Citing *Pipefitters Local 438 (George Koch & Sons, Inc.)*, 201 NLRB 59, 62.
>
> (2) Where the contracting employer has control at any time over the assignment of the work and thereafter gives up that control, it is not protected under the Board's right of control doctrine. Citing *Steamfitters Local 342 (Overaa Construction Co.)*, 225 NLRB No. 195.

In *George Koch & Sons, Inc.*, Koch was awarded a contract by General Electric for the design, manufacture and installation of two industrial finishing systems to be used by G.E. in the preparation of metal appliances at a Maryland facility. Koch prefabricated some pipe to be used to pretest the systems and entered into a contract with a plumbing subcontractor to install all the pipe, including the prefabricated pipe, needed by the new system. Relying on a work preservation clause in its contract with the subcontractor, the union members declined to install the prefabricated pipe.

The NLRB found the union's contract to have a valid work preservation clause, but the Board found the union's conduct violative of the secondary boycott provisions in Section 8(b)(4)(B) of the Act. In distinguishing the Frouge fact situation under *National Woodwork*, the Board, as had the Court, noted that Frouge's construction contract did not require installation of prefabricated ma-

terials. Frouge made a free decision to use the proscribed materials and could freely have changed his mind.

> [U]nlike Frouge but like the other three contractors in *National Woodwork,* Phillips' [the subcontractor] contract with Koch *specified* that Phillips was to install as part of its contract, the pipe prefabricated beforehand by Koch at its plant. We deem this factor crucial in determining the legality of Respondents' attempts here to enforce the admittedly valid work preservation clause against Phillips. (201 NLRB 59, 61)

The Board concluded that Phillips was a neutral in the union's pressuring of *Koch.*

The basic point in *Koch* is that when the dispute arose, Phillips had no power to achieve the union's goal. Since the prefabrication provision was in his contract with *Koch,* Phillips had no power from the outset to meet the union's demands. The past, present and future language set forth in the decision merely emphasizes Phillips' present lack of control, and the fact that it did nothing to divest itself of such control. In the present case, Collins did nothing to divest itself of control over the type of installation to be made. The decision was made by the owner. If Collins, upon being awarded the bid calling for a conventional installation, opted to use on its own initiative the Electro/Connect system, and thereby eliminated Local 6 work, it would be appropriate to give effect to the work preservation clause in the Contract.

In *Steamfitters Local 342,* Overaa was the successful bidder on an East Bay MUD pumping project at Moraga. The plant was to be constructed in accordance with MUD specifications. Overaa and Local 342 were parties to a

collective bargaining agreement, and Overaa employed three pipefitters to perform on-site work. Overaa was required by its MUD contract to install certain types of fabricated pipe which had to be tested at certain stages of the fabrication. Overaa subcontracted the fabrication to Conduit Fabricators Inc. Job site members of Local 342 refused to install the pipe.

The NLRB found the basic issue to be whether the fabrication of the pipe was work which fell within the scope of the work preservation clause in the contract as work which was either "traditionally performed" or was "fairly claimable." The Board found the work to be not within the scope of the work preservation clause. Thus, the case is distinguishable from the case before the Arbitrator since no contention is made here that the work in question is not work historically performed by Local 6 members.

Although the NLRB stated that the right-to-control-test was not dispositive of the issue before it, the Board discussed the issue at some length, saying that Overaa was under no compulsion under its MUD contract to sub out pipe fabrication, and when it did so, it was an exercise of control by Overaa over the work. Thus, it would appear that had the Board found the work to be within the scope of the work preservation clause of the contract, the union would have prevailed.

The action of Collins in the present case is distinguishable from that of *Overaa* in the cited case in that it does not appear from the record that Collins exercised any control in the making of the decision which resulted in shifting from a conventional installation to the Electro/

Connect installation. Thus, it cannot be argued that Collins exercised control to relinquish control. It had no voice in the change and had no unused power to veto the change; at present, it has no power to award branch wiring work to its employees. Since Collins, unlike *Overaa,* did not create and is not responsible for its lack of power to award the work, the *Overaa* decision is inapposite.

As an independent argument in support of the Union position, its counsel argues that Collins violated the refusal to bargain provisions [Section 8(a)(5)] of the National Labor Relations Act by unilaterally deciding to use the Electro/Connect system as opposed to a conventional system. In support of this argument counsel cites the following cases: *Richland, Inc.,* 180 NLRB 91, 101 (1969); *Atlanta Daily World,* 192 NLRB 159 (1971); *C & S Industries,* 158 NLRB 454 (1966); and *Atlanta Daily World,* 179 NLRB 999, 1013 (1969).

In *Richland, Inc.,* the Board held that the employer violated 8(a)(5) by refusing to bargain over the decision to install automated equipment and refusing to bargain with respect to the effects of that decision.

> . . . Any change in an Employer's operations which threatens "the elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act." *Town & Country Manufacturing Co.,* 136 NLRB 1022. (180 NLRB 91, 101)

The two *Atlanta Daily World* cases and *C & S Industries* each stand for the proposition that an employer violates Section 8(a)(5) of the National Labor Relations Act

when it unilaterally changes the manner in which bargaining unit work has customarily been performed, or, alternatively, it unilaterally commences sub-contracting or increasing the contracting of bargaining unit work. However, this line of cases is not in point. Each deals with a fact situation in which the employer party to the collective bargaining contract unilaterally effected changes in wages or working conditions by virtue of its control over those wages and working conditions. Since the *sine qua non* of the *Enterprise Assn.* type of change in working conditions is the conclusion that the effected changes are beyond the employer's control, they do not constitute changes regarding which the employer can be required to bargain. It is clear from the cases that had Collins initiated the use of Electro/Connect he would be required by Section 8(d) of the National Labor Relations Act to bargain with the Union regarding that decision and regarding the impact of that decision upon bargaining unit employees. However, as noted above, the use of Electro/Connect was not Collins' decision, but was rather a decision imposed upon it, and with respect to which it was required by the terms of its contract with the general contractor to comply. Thus, the Union's argument that Collins refused to bargain with the Union regarding the installation of an Electro/Connect system, and thereby violated both the Collective Bargaining Agreement and the National Labor Relations Act must be rejected.

Since it has been concluded, in the context of the fact situation involved herein, that the provisions of the "Scope of Agreement" language in the Contract cannot be given effect, the question of whether installation of the Elec-

tro/Connect system would violate the "Scope of Agreement" clause (if that clause were enforceable in the present context) has not been dealt with. Any conclusion with respect to that question would be dicta.

Thus, for all the reasons set forth in the foregoing, and in accordance with the Award dated May 3, 1977, made available to the parties in advance pursuant to agreement between the parties, the grievance is denied and the employer may use the Electro/Connect system in the Bank of America fixture installation job at Market and Van Ness without violation of the Collective Bargaining Agreement or the National Labor Relations Board Act.

AWARD

The grievance is denied. Thus, the employer may use the Electro/Connect system in the Bank of America fixture installation job at Market and Van Ness without violation of the Collective Bargaining Agreement or the National Labor Relations Board Act.

Dated: 5-26-77 /s/ Adolph M. Koven
Adolph M. Koven, Arbitrator

APPENDIX G

Local Union No. 6
International Brotherhood of Electrical Workers
55 Fillmore Street - San Francisco, Calif. 94117 - 861-5752

HAND DELIVERED—6/24/77

June 24, 1977

Mr. Bart Dickson
San Francisco Electrical Contractors Assn., Inc.
1850 Mission Street
San Francisco, Ca. 94103

Dear Mr. Dickson:

Commencing at 8:00 a.m. on Monday, June 27, 1977, I.B.E.W. Local 6 shall withdraw and withhold men from the Collins Electric job at the Bank of America at 11th and Market Streets in San Francisco. The only purposes of this economic action are as follows:

1. To protest the San Francisco Electrical Contractors Association's refusal to participate in the labor management committee process contained in the Agreement, and which we invoked on May 19, 1977. Our attorney has advised us that we are relieved of our obligation to forego self-help in this matter as you have refused to participate in the dispute resolution machinery contained in the Agreement.

2. To protest Collins' unfair labor practices, to wit: Collins' refusal to furnish information concerning the modification of the Westinghouse fixtures to be used

in the Bank of America job, so that I. B. E. W. Local 6 may determine at whose instance the modification work was performed. We wish to avoid any action which would violate the National Labor Relations Act under the Board's right to control doctrine and to determine under that doctrine whether the modification work constitutes a violation of our Agreement.

We will immediately request Collins' electrician employees to return to work upon your agreement to process our May 19, 1977 grievance through the contractual procedures.

Very truly yours,
FRANZ E. GLEN
Franz E. Glen
Business Manager-Financial Secretary

APPENDIX H

Local Union No. 6
International Brotherhood of Electrical Workers
55 Fillmore Street - San Francisco, Calif. 94117 - 861-5752

Hand Delivered

May 19, 1977

Mr. Bartlett Dickson
Executive Manager
San Francisco Electrical Contractors Association Inc.
1850 Mission Street
San Francisco, Ca. 94103

Dear Mr. Dickson:

This will serve as notice that Local Union No. 6, I.B.E.W., is requesting a meeting as required in Section 6 of Article I of the Directory of Agreements and if necessary a Labor-Management meeting as outlined in Section 5 of Article I of the Directory of Agreements. We are requesting this meeting to resolve the following dispute with Collins Electric Company, which exists on their job at the Bank of America at Market and 11th Streets, San Francisco, California.

Local Union No. 6, I.B.E.W. contends that Collins Electric Company has violated the "Scope of Agreement" and Section 3 of Article II of the Agreement.

The alleged violation occurred as follows: Collins Electric Company contracted out the installation of receptacles that have been installed in the Westinghouse lighting fix-

tures for the use in the Electroconnect plug system which is being installed on the above indicated job.

Local Union No. 6 contends this is a violation of the Agreement which has been upheld by the Labor-Management Committee at various times including their meeting of April 5, 1966, in which they ruled—"The lighting fixtures shall be delivered with no preassembled fittings".

Local Union No. 6 seeks as a remedy for this violation the following alternative solutions:

1. An amount of wages and fringes equal to the amount of time that was used to install these receptacles in the lighting fixtures to be paid to the top people on the out-of-work list who were denied employment through this violation.
2. The receptacles of the lighting fixtures be removed and re-installed by employees covered by the Inside Wiremen Agreement on the job site.

Please arrange a meeting between the parties as per the requirements of the Agreement so that we may resolve this matter.

Yours very truly,
FRANZ E. GLEN
Franz E. Glen
Business Manager-Financial Secretary

APPENDIX I

Local Union No. 6
International Brotherhood of
Electrical Workers
55 Fillmore Street,
San Francisco, Calif. 94117, 861-5752
HAND DELIVER, March 18, 1977.
Mr. George Clyne
Collins Electric Company
1615 Cortland Avenue
San Francisco, California 94110
Dear Sir:
It is my understanding as a result of our conversation Thursday, March 17, following the arbitration hearing involving the use of Electro/connect system at the Bank of America Job, that you expect delivery of Westinghouse fixtures modified to accept the Electro/connect plug on March 18, 1977.
It is our intention to off load these fixtures, but not to install same unless and until we are compelled to do so by an adverse arbitration decision. In connection with these fixtures, I request full information from you as to how it came to pass that Westinghouse supplied these fixtures. Are these the fixtures you originally ordered, modified by Westinghouse, or a new order? What did Westinghouse do to modify those fixtures? and at whose request?
Yours very truly,
FRANZ E. GLEN
Franz E. Glen
Business Manager-Financial Secretary
FEG:cc
OPE 3-AFL-CIO
cc: Mr. Bartlett Dickson
Job Site

APPENDIX J

29 U.S.C. § 101:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 102:

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or

other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. § 104:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C. § 107:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the

order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

29 U.S.C. § 108:

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

29 U.S.C. § 109:

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out

of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

29 U.S.C. § 110:

Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

29 U.S.C. § 185:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined

in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 78-481

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL NO. 6, AFL-CIO,
Petitioner,

vs.

SAN FRANCISCO ELECTRICAL CONTRACTORS ASSOCIATION,
Respondent,

COLLINS ELECTRIC COMPANY,
Real Party in Interest.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

In the Supreme Court
OF THE
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No. 78-481

International Brotherhood of Electrical Workers
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Respondent,

Collins Electric Company,
Real Party in Interest.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, San Francisco Electrical Contractors Association (SFECA), and Collins Electric Company, real party in interest, respectfully request that this Court deny the Petition for a Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 577 F.2d 529, and appears at pages A-1 through A-12 of appendix to the petition before this Court.

JURISDICTION

The judgment of the Court of Appeals (App. B) was entered on June 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petition was received by respondent's attorney on September 20, 1978.

QUESTIONS PRESENTED

The general question presented is whether the U.S. District Court possessed jurisdiction under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185, to enforce an arbitration award on the merits, by enjoining post-award strike activity over completely identical issues.

Incidental to resolution of this issue are the following related questions:

1. Whether bargained-for finality of an arbitration award after full hearing on the merits, eliminates any further duty of identical parties to arbitrate identical issues.

2. Whether the U.S. District Court, rather than a new and different arbitrator, has primary jurisdiction to determine finality of an arbitration award as an incident of enforcement of the award.

3. Whether the District Court's action in construing the scope and finality of the award, and granting injunctive relief to enforce it, was a proper accommodation of Section 301 of the Taft-Hartley Act with Sections 4, 7, 8 and 9 of the Norris-LaGuardia Act, pursuant to *Boys Market v. Retail Clerks Union*, 398 U.S. 235 (1970).

STATUTES INVOLVED

Respondent's discussion of statutes herein includes only those set forth in Appendix J to the Petition.

CONTRACTUAL PROVISIONS INVOLVED

Respondent's discussion of relevant contract terms requires no references other than to the terms set forth in the petition, pages 3 and 4.

STATEMENT OF THE CASE

Respondent, San Francisco Electrical Contractors Association, (SFECA) is the duly recognized business representative and bargaining agent for member employers, including Collins Electric Company of San Francisco, real party in interest (Collins).

In 1976, the Bank of America N.T. & S.A. engaged in the erection of a 23-story computer data center in San Francisco. Timely completion was absolutely critical to the owner and all contractors, as over one-half billion dollars worth of computer equipment was scheduled to begin service immediately thereafter.

Collins became involved when it contracted, with the general contractor, to furnish and install 11,000 conventional Westinghouse light fixtures, with all necessary branch wiring, and all other temporary and permanent wiring for the structure and computer complex.

In November or December, 1976, the bank, as owner, informed Collins of its desire to substitute the entire system of conventional lighting, with a completely pre-assembled system called Electro-Connect (ECS). ECS, as graphically demonstrated in an illustrated sales brochure (which was a central exhibit to the later arbitration) is a fully integrated, factory-assembled lighting and power distribution system. Prior to installation, the owner's architects and

electrical engineers applied for special approval by the San Francisco County electrical and building inspectors, and by letter of January 7, 1977 advised them that:

> "The system as proposed for use in San Francisco is U.L. approved and listed and *will be connected to lighting fixtures* which also will be U.L. approved and *listed with a plug-in feature.* The pieces of flexible connector will be ordered to specific lengths and the *plugs installed and wired at the factory.* If the flexible connectors are properly scheduled and ordered, *there should be no need to field-cut or wire any of the lighting system connections beyond the distribution boxes.*" (emphasis added)

This letter was also one of Collins' central exhibits to the later arbitration, and still later an exhibit to Respondent's complaint for injunctive relief.

Several weeks after Collins received the Change Order for ECS from the owner and its agents, petitioner (Local 6) first expressed its objection to the ECS use, alleging that it infringed on a work preservation clause of the collective bargaining agreement in force between the parties. By letter to Collins of January 13, 1977, Local 6 clearly expressed its concern with ECS, as a lighting fixture *system,* and demonstrated its understanding that prewired assembles and fittings were central aspects. The letter, as an exhibit to the arbitration and later complaint for injunction, provides in pertinent part:

> *"This office has just become aware that your firm is contemplating using a lighting fixture system such as the Electro-Connect system* on your Bank of America job here in San Francisco.

> *It is our understanding that such a system comes with prewired assemblies of wiring and fittings.*
>
> It is the position of the I.B.E.W. Local Union No. 6, that any such system would be installed in direct violation of that Labor-Management Committee decision and it would also be a breach of the current inside Agreement." (emphasis added)

In response to the union objection, the dispute over the ECS was mutually submitted to the grievance and arbitration procedures mandated as "final and binding" by Section 8 of the working agreement (quoted at page 4 of petition).

The scope of issues and supporting evidence presented to the arbitrator on March 17, 1977, consumed a full day of hearing, and included over 100 separate pages of printed and photographic matter. Each side introduced numerous exhibits at the outset of the hearing, and engaged in substantially unrestricted cross-examination of each other's witnesses.

Additionally, both pretrial and post-trial briefs were submitted by the parties, creating a combined record of briefs, exhibits, and transcripts in excess of 350 pages.

Of central concern to SFECA, and more so to the union, were fact issues of:

1. Estimated losses of protected work if the ECS system were installed as ordered, and

2. Whether or not Collins had unilaterally exercised "control" in connection with the selection or substitution of ECS for the conventional Westinghouse fixtures, pursuant to the "control test" set forth in this Court's recent opinion in *National Labor Relations*

Board v. Enterprise Association, NLRB v. Plumbers Local 638 (Enterprise Association), et al., 429 U.S. 507, 97 S.Ct. 891 (1977).

The arbitrator, to avoid further delay on the construction work, announced an abbreviated award in favor of Collins, on May 3, 1977:

> "The grievance is denied. Thus the employer may use the Electro/Connect system in the Bank of America fixture installation job at Market and Van Ness without violation of the collective bargaining agreement of the National Labor Relations Act."

Pursuant to stipulation, the full written opinion followed several weeks later. In the interim, complying with the *owner's* Change Order, Collins sent back the conventional Westinghouse fixtures to the Westinghouse factory where they could be modified to integrate the ECS female adapter plugs. Both the ECS adapter plugs and the Underwriter's Laboratory approval of their combination into a "prefabricated *lighting and power distribution assembly*" had been set forth in respondent's exhibits to the arbitration.

Despite the fact that these aspects of work elimination, fixture adapters, and U.L. approved factory pre-fabrication had just been set forth at arbitration on March 17, 1978, the union by letter of March 18, 1977 demanded additional data on these issues, and violated the no-strike clause of the contract by refusing to handle the factory-modified fixtures. (See text of letter, page I-1 of appendix to petition)

Because the issues had just been submitted to the arbitrator, and the union had already examined all exhibits,

especially the product brochures, U.L. rating certificates, and cross-examined Collins' president as to the company role in using the ECS, Collins and SFECA declined any further debate with the union. The union's alleged surprise and feigned lack of information over the factory modification of the conventional fixtures is in direct conflict with its analysis of the ECS system as presented one day before to the arbitrator, and summarized in his full written opinion of May 26, 1977.

The arbitrator's opinion recited the testimony and position set forth by the union. In pertinent part, union counsel and witnesses claimed that:

> ". . . Normally, a project similar to the Bank of America job would require that employees covered by the contract perform the following work:
>
> > . . . splicing the wires from the flex and the wires coming into the junction box from the distribution panel; closing the junction boxes; *assemblying the fixtures, attaching the fixture to the flex and splicing the fixture wires to those in the flex; and putting the cover on the fixture and installing the light tubes and defuser.*
>
> *Based upon a description of the Electro/Connect system as set forth in the manufacturer's brochure, a union witness estimated that 90% of the work described above would be eliminated if Electro/Connect were used."* (emphasis added) (Page F-5, appendix to Petition)

The arbitrator then summarized the union position, including the *union's* conclusion that:

> "2. According to the Underwriters Laboratories (UL), Electro/Connect is a prefabricated lighting and power distribution assembly. *It is totally pre-*

fabricated prior to delivery to the job site." (emphasis added)

On being advised of respondent's refusal to further discuss the system pending the arbitrator's decision, the union *did not* seek to re-open the matter before the arbitrator having responsibility for the original grievance. Instead, it apparently gambled that it would prevail, and took *no steps* to perfect a formal, subsequent grievance until *after* the unfavorable award issued on May 3, 1977.

Faced with respondent's refusal to engage in further grievance procedures over identical issues resolved by the award, the union filed an unfair labor practice charge with the National Labor Relations Board based on the refusal. The NLRB, after reviewing in depth the *full series* of exhibits, briefs and award involved in the arbitration, rejected the claim with the following explanation.

> "The investigation disclosed insufficient evidence to support the charge in that *the union apparently had ample opportunity to solicit the information* [that the Westinghouse unit would be factory modified] by questions during the arbitration proceeding and failed to do so. *In this regard, it is noted that the Union also failed to move for reopening of the arbitration proceeding even after it received the allegedly new knowledge of the nature of the work involved.* Under all of these circumstances, it is concluded that further proceedings are not warranted. I am, therefore, refusing to issue complaint in this matter."

Despite specific fact findings by the arbitrator that

> "Collins Electric is *powerless* to provide the work which the Union demands unless the Bank of America is prepared to forego the use of the Electro/Connect system." (F-12, appendix to Petition),

the union continued to pressure Collins for further grievance of the issues. Rather than seeking a judicial order for further grievance and arbitration, the union next delivered Collins an ultimatum, threatening strike action.

Collins refused to delay the closely scheduled construction job with further grievance and arbitration proceedures, which had already consumed or otherwise obstructed many weeks of its alloted time for performance. The union stopped *all* phases of electrical work on June 27, 1977. Collins, with SFECA, applied for injunctive relief by the District Court on June 30, and filed the union's stipulation to state court confirmation of the award the same day.

Collins and SFECA supported their application for injunctive relief with numerous exhibits originating from the arbitration plus excerpts of the award, plus extensive declarations relating to:

1. Immediately impending risks of life and property at the job site due to the strike;

2. Financial injuries to Collins and the owner posed by delay;

3. Major acts of vandalism to the job.

Following oral argument and memoranda of law by counsel for both parties, a temporary restraining order issued enjoining strike activity pending further hearings on the propriety of a preliminary injunction.

Approximately two weeks later, counsel for both sides submitted further briefs, oral argument, and testimony bearing on:

1. The scope of issues presented before the arbitrator;

2. The scope of issues for which the union sought further grievance;

3. The scope of issues and evidence resolved by the arbitration award;

4. The nature and extent of Collins' conduct in reliance upon the owner's change order and the arbitrator's award;

5. The nature of financial recovery which the union would claim in the event a second arbitration were ordered;

6. The circumstances surrounding the union's failure to re-open the original arbitration;

7. The duty of the parties to engage in further arbitration of identical issues as a condition to continued injunction of strike activity;

8. Whether bargained-for finality of an arbitration award could be enforced by the District Court;

9. Jurisdiction in the District Court to hear the above cited issues, and to grant injunctive relief.

10. Equitable basis for injunctive relief.

At the close of hearings, the District Court issued a preliminary injunction of strike activity, without requiring additional arbitration, based on its findings of facts and conclusions of law. (set forth at D1-D6 of appendix to petition)

On appeal, the judgment of the District Court was affirmed. The following trial finding of fact was obviously deemed of controlling significance in the opinion of the 9th Circuit Court of Appeals:

> "12. There was before the arbitrator the specific question as to whether the installation of a complete Electro Connect system was a violation of the collective bargaining agreement, and what defendant seeks herein to do is to take a portion of that installation and again engage in said grievance procedure despite the fact that the portion is part of the whole system, which point *was fully discussed in its entirety before said arbitrator.*" (emphasis added) (A-12, appendix to petition)

REASONS FOR DENYING THE WRIT

I. No Substantial Conflict Exists With Other Lines of Cases.

The Court of Appeals decision neither conflicts with nor misconstrues any pertinent lines of cases decided by this Court. Contrary to the union's assertions, the relief granted by the District Court, and affirmed on appeal, *preserves* the integrity of the arbitration process, by enforcing bargained-for finality of awards.

This Court's most current pertinent opinion regarding equitable enforcement of arbitration procedures is *Boys Markets Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235, 90 S.Ct. 1583 (1970). There, this Court re-assessed the proper role and necessity for equitable relief in the context of mandatory arbitration of labor disputes:

> "An incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and

most expeditious method by which the no-strike obligation can be enforced is eliminated . . .

. . . Even if management is not encouraged, by the unavailability of the injunction remedy, to resist arbitration agreements, the fact remains that the effectiveness of such agreements would be greatly reduced if injunctive relief were withheld. Indeed, the very purpose of arbitration procedures is to provide a mechanism for the *expeditious settlement* of industrial disputes *without* resort to strikes, lock-outs, or other self-help measures. This basic purpose is obviously largely undercut if there is no *immediate, effective* remedy for those very tactics which arbitration is designed to obviate." (emphasis added) 398 U.S. 235, 248, 90 S.Ct. 1583, 1590.

It is true that *Boys Market conditioned* the availability of the strike injunction on the willingness of the employer to submit the dispute to binding arbitration. However, the end purpose of such a requirement was the peaceful, final resolution of a labor dispute, *after* a hearing on the merits.

As clearly reiterated by this Court in *Buffalo Forge v. United Steelworkers of America, AFL-CIO,* 428 U.S. 397, 412, 96 S.Ct. 3141, 3149 (1976).

> "'*Final adjustment* by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.' *Gateway Coal Co. v. Mine Workers,* 414 U.S. at 377, 94 S.Ct. at 636." (emphasis added)

This Court, in a separate passage from its opinion in *Buffalo,* described the central purpose and effect of its earlier *Boys Market* ruling:

> "The driving force behind *Boys Market* was to implement the strong congressional preference for private dispute settlement mechanisms agreed upon by the parties." 428 U.S. at 407.

These policies and concepts are all directly served by injunction of strike activity perpetrated by a union, over issues just fully resolved by binding abitration.

Granting of such relief *enforces* the finality of the arbitration award which both parties bargained for, and without which there could be no "final settlement".

Additional consistency of the decision in question with controlling case law and statutes appears yet again within the *Buffalo* opinion:

> "Furthermore, were the issue [of illegal strike action] arbitrated and the strike found illegal, the relevant federal statutes as construed in our cases *would permit* an injunction to enforce the arbitral decision. *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 80 S.Ct. 1358." *Buffalo Forge,* supra, 428 U.S. 405, 96 S.Ct. 3147.

Clearly, under the above rulings, once a dispute subject to mandatory arbitration has been fully submitted on its merits, and the arbitrator has issued a final ruling and award, injunctive relief to *enforce* the award is wholly proper.

Nothing in any of the cases cited in the union's petition remotely suggests that arbitration is an *end* in itself, to be endlessly pursued without regard for final termination of a given set of issues. To the contrary, as indicated above, the

central purpose and sole justification for *fostering* arbitration, is *final* resolution of covered disputes in a peaceful manner.

Neither Collins nor SFECA challenges here the clearly expressed judicial and congressional preferences for binding arbitration as the most desirable and expeditious forum for resolution of labor disputes. What they vigorously deny is the union's alleged right to re-submit issues identical to those resolved at one arbitration, before a new arbitrator, on the sole premise that the arbitration clause covers "any matter" of dispute not settled by the grievance committee. Such an interpretation would allow any party dissatisfied with one arbitration result, to indefinitely protract the course of settlement, by repetitious re-arbitrations of same or similar claims, until a favorable result was obtained, or the opponent was forced by time considerations to default the interminable contest.

Such an interpretation completely frustrates the central purpose of arbitration, and denies the prevailing party the benefit of bargained-for *finality*. Moreover, the position taken by the union in the present case would effectuate a complete travesty of the vital concept of respose embodied by the doctrine of *res judicata*. An unfettered freedom of identical parties to re-arbitrate substantially identical fact issues, of a technical and economic complexity, would doubtless generate more friction than cooperation between labor and management, and multiply, rather than diminish, economic hardships to all involved.

This same conclusion flows from an analysis of the reciprocal duties created by the instant collective bargaining agreement. Viewed against the expressed congressional

policy of peaceful *settlement* of disputes, the parties to the original dispute (summarized in the arbitration award, F-1 - F-3 of appendix) had mutual duties to set forth their best statements of the issues of dispute. Having once joined the issues before the arbitrator, each party had further duties to produce the best evidence available in support of its position, to fully examine the merits of the opponent's position and evidence, to present its most persuasive arguments, and thereafter to finally submit the entire dispute for decision by the arbitrator. In the event that the union, through no fault of its own, had overlooked relevant evidence, or discovered additional critical circumstances not reasonably available before or during the hearing, it had an implicit duty to promptly advise the opponent and the arbitrator.

Had the union done so on March 18, 1977, rather than gambling on a favorable result, the original arbitrator might have considered reopening the matter, given Collins a chance to respond, and thereafter proceeded to complete his ruling. If the union felt strongly enough over its "discovery" on the day after the first hearing to later initiate a whole new grievance, certainly it had ample cause to advise the arbitrator best informed of the technical characteristics of the original dispute. By failing to do so, the union automatically created a second period of delay and frustration inherent in the processing of a second grievance.

In the instant case, construction scheduling, and Collins' concerns over compliance with the owner's Change Order and U.L. requirements, caused it to change its position and commence factory modification of the fixtures, even while the first arbitration was under submission. The union

was doubtless also aware that time was of the essence in this particular job. Consequently, the need for "expeditious settlement" was pressing, and the bar of *res judicata,* determined by the District Court, was appropriate under the circumstances. Hence, there was no further duty by Collins to commence an entire new course of grievance and arbitration, before a new arbitrator on May 19, 1978, after the union had conclusively lost on the identical dispute.

II. The District Court Had Jurisdiction To Review The Scope Of Issues Presented In The Alleged Second Grievance, And To Bar Further Strike Action Or Arbitration Based On The Doctrine Of Res Judicata.

Nothing in the District Court's action in comparing the issues of the first grievance and award, with the second alleged dispute, followed by preliminary injunction, is inconsistent with present case or statutory law. In *John Wiley & Sons v. Livingston,* 376 U.S. 548, 84 S.Ct. 909 (1964), the Court clearly re-affirmed the long standing *primary* jurisdiction vested in the District Court, to determine what issues may be subjects of compulsory arbitration:

> "'Under our decisions, whether or not the company was bound to arbitrate, *as well as what issues it must arbitrate,* is a matter to be determined by the Court on the basis of the contract entered into by the parties.' *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 241, 82 S.Ct. 1318, 1320, 8 L.Ed.2d 462. Accord, e.g., *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 . . . The duty to arbitrate being of contractual origin, a compulsory submission to arbitration *cannot* precede *judicial* determination that the collective bargaining agreement does in fact create such a duty." (emphasis added) 84 S.Ct. 913, (see also *Buffalo Forge* referred to above.)

Here, the District Court found that identical issues had just been resolved by an arbitration award, and that the contract made the award final and binding. Implicit in these findings was a finding that the contract did *not* compel or allow re-arbitration of the same issues.

The union assertion that *only* a second arbitrator could consider the defense of *res judicata* is thus completely at odds with the above line of cases, as well as a New Jersey District Court opinion. In *Todd Shipyards Corp. v. Industrial Union of Marine Workers,* 242 F. Supp. 606 (1965), the Court granted declaratory relief to the employer, upholding a favorable discharge ruling after arbitration, and *barred* further arbitration or litigation of the same issues by the employee, with the following explanation:

> "Defendant argues that *res judicata* is a defense on the merits and one for an arbitrator to determine on hearing the instant grievance . . .
>
> The contention that *res judicata* is a defense on the merits would be persuasive in a situation where in the application of the doctrine it is necessary to resolve a *genuine issue* of material fact. Such is *not* the case here. The opinion of Arbitrator Davis is clear and unambiguous, *precisely covering the subject matter of the grievance presented by defendant,* i.e. Bateman's discharge from employment with plaintiff at its Hoboken yard. An award of an arbitrator acting within the scope of his authority *has the effect of a judgment and is conclusive as to all matters* submitted

for decision at the instance of the parties. *Panza v. Armco Steel Corp.*, 316 F.2d 69 (3rd Cir. 1963); See 5 Am.Jur.2d, Arbitration and Award § 147. Moreover the *finality of disposition* of a grievance by arbitration is what the parties here *contemplated by express provision in the labor agreement.*" 242 F. Supp. at 611 (emphasis added)

The union's reliance on the limited ruling set forth on laches in *Operating Engineers v. Flair Builders,* 406 U.S. 487, 92 S.Ct. 1710 (1972) is totally misplaced. In that case, *no* grievance or arbitration on the merits had occurred, and referral of the defense of laches to the arbitrator created no duplicate burdens, nor eviscerated the finality of an unambiguous earlier award.

III. The Preliminary Injunction Confirmed on Appeal Properly Accommodates Section 301 of the Taft Hartley Act With Sections 4, 7, 8 and 9 of The Norris-LaGuardia Act.

The union's petition makes incorrect assertions that the Norris-LaGuardia Act bars the injunctive relief granted in the instant case. This position wholly disregards the process of accommodation of this early legislation with later jurisdictional powers set forth in Section 301 of the Taft Hartley Act, 29 U.S.C. § 185, as required by *Boys Markets:*

> "As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many

> of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. Thus it became the task of the courts to *accommodate,* to reconcile the older statutes with the more recent ones." 398 U.S. 250, 90 S.Ct. 1592.

The Court then proceeded to define the process of accommodation, and the circumstances for which it was appropriate:

> "A leading example of this accommodation process is *Brotherhood of Railroad Trainmen v. Chicago River & Ind. R. Co.,* 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957). There we were confronted with a peaceful strike which violated the statutory duty to arbitrate imposed by the Railway Labor Act. *The Court concluded that a strike in violation of a statutory arbitration duty was not the type of situation to which the Norris-LaGuardia Act was responsive,* that an important federal policy was involved in the peaceful settlement of disputes through the statutory mandated arbitration procedure, *that this important policy was imperiled if equitable remedies were not available to implement it,* and hence that Norris-LaGuardia's policy of nonintervention by the federal courts should *yield* to the *overriding interest* in the successful implementation of the arbitration process." Id. at 90 S.Ct. at 1594, 398 U.S. at 253. (emphasis added)

In the same passage, this Court extended this concept of accommodation to cases involving purely contractual, nonstatutory duties of compulsory binding arbitration.

Therefore, the facts of the present case also required that such an accommodation occur. The District Court's preliminary injunction *enforcing* the final result of compul-

sory arbitration, is wholly distinct from the *ex parte* type orders, and associated evils, at which the Norris-LaGuardia prohibitions were initially directed. Its main purpose and immediate effect was *not* to prevent peaceful resolution of labor strife, but to implement the end product of a comprehensive and full arbitration hearing on the merits.

Similar evasive tactics on the part of a union, which had lost an arbitration award, were unconditionally *rejected* by this Court in the case of *International Longshoreman Association v. Philadelphia Marine Trade Association,* 389 U.S. 64, 88 S.Ct. 201 (1967):

> "We do not review here, as in *Sinclair,* a refusal to enter an order prohibiting unilateral disruptive action on the part of a union *before* that union has submitted its grievances to the arbitration procedure provided by the collective bargaining agreement. Rather, the union in fact submitted to the arbitration procedure established by the collective bargaining agreement, but, if the allegations are believed, *totally frustrated* the process by refusing to abide by the arbitrator's decision. Such a 'heads I win tails you lose' attitude plays fast and loose with the desire of Congress to encourage the peaceful and orderly settlement of labor disputes." (emphasis added) 88 S.Ct. at 209.

CONCLUSION

A close review of the extensive arbitration proceedings set forth in the award discloses good faith submission by respondent and the employer of the initial grievance to binding arbitration. All parties had ample opportunity to present issues, exchange exhibits, cross-examine witnesses, and fully explore the ramifications of ECS usage by Collins.

Numerous statements by the union before and during the arbitration disclose a full comprehension of the ECS, its adapter features, and the fact that the system, with adapters and fixtures, must be factory pre-assembled, although eliminating major portions of allegedly protected work. Therefore, union attempts to re-arbitrate substantially identical issues, on being advised of loss at the first arbitration, was an abuse of the arbitration clause. Strike action taken to force handling of a second grievance over the same issues was properly enjoined by the District Court, as the first award was *res judicata,* barring further arbitration or dispute. The District Court's proper exercise of its primary jurisdiction served to implement, not obstruct the arbitration process. Therefore, the decision of the Court of Appeal in affirming the injunction was consistent with current statutes, case law and labor policy as interpreted by this Court. Under all these circumstances, the union's petition for writ of certiorari should be denied.

Dated: October 18, 1978.

Respectfully submitted,
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